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ISSUES RELATED TO COMPETITION LAW OF PARTICULAR RELEVANCE TO DEVELOPMENT

PREPARATIONS FOR A HANDBOOK ON COMPETITION LEGISLATION

Handbook on Competition Legislation

Note by the UNCTAD secretariat

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INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides in section F.6 (c) for the compilation of a Handbook on Restrictive Business Practices Legislation.

2. Furthermore, the Fourth Conference to Review All Aspects of the Set, held in Geneva from 25 to 29 September 2000, as well as the Intergovernmental Group of Experts on Competition Law and Policy at its third session, held in Geneva from 2 to 4 July 2001, requested the UNCTAD secretariat to continue to publish further issues of the Handbook on Competition Legislation, including regional and international instruments, which should be complemented by a summary of the main provisions of competition laws on the basis of inputs to be submitted by member States (see the resolution adopted by the Review Conference, (TD/RBP/CONF.5/16) and the Agreed Conclusions of the Intergovernmental Group of Experts at its Third session (TD/B/COM.2/CLP/L.7).

3. Accordingly, the secretariat has prepared this note, which contains commentaries on the texts of competition legislation of Indonesia, New Zealand and Thailand.*

4. Thus, to date the UNCTAD secretariat has published in its Handbooks notes containing commentaries on and texts of competition legislation of 45 countries: Algeria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Hungary, Indonesia, Italy, Jamaica, Japan, Kenya, Lithuania, Mexico, Morocco, New Zealand, Norway, Pakistan, Poland, Portugal, Republic of Korea, Romania, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Thailand, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela and Zambia.

5. The Secretary-General of UNCTAD, in his note of 8 March 1996, requested States which had so far not done so, or which had introduced new or amending competition legislation since their last communication to the UNCTAD secretariat, to provide the latter with their relevant legislation, court decisions and comments, on the basis of the format indicated (see below). (However, in the case of States adopting competition legislation for the first time, the commentary may not necessarily accord with the format.) In order to facilitate the reproduction of texts of legislation in more than one official language of the United Nations, States were invited to submit, if possible, the text of their legislation in one or more other languages of the United Nations.

6. The UNCTAD secretariat is grateful to the States which have contributed the material requested for the compilation of the Handbook, and once again requests States which have not yet done so to comply with the request of the Secretary-General of UNCTAD referred to above.

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* *The contributions are reproduced in the language and form in which they were submitted to the secretariat.*

FORMAT FOR CONTRIBUTIONS TO THE HANDBOOK

A. Description of the reasons for the introduction of the legislation

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation.

C. Description of the practices, acts or behaviour subject to control, indicating for each:

(a) The type of control – for example, outright prohibition, prohibition in principle or examination on a case-by-case basis;
(b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, acts or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising.

D. Description of the scope of application of the legislation, indicating:

(a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;
(b) Whether it applies to all practices, acts or behaviour having effects on the country in question, irrespective of where they occur;
(c) Whether it is dependent on the existence of an agreement, or no such agreement being put into effect.

E. Description of the enforcement machinery (administrative and/or judicial), indicating any notification and registration agreement, and principal powers or body (ies).

F. Description of any parallel or supplementary legislation, including treaties or undertakings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issues covered.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof.

COMMENTARIES ON COMPETITION LEGISLATION

I. COMMENTARY BY THE GOVERNMENT OF INDONESIA ON THE COMPETITION LAW OF INDONESIA

Background

Indonesian economic development during the first long-term development produced a tremendous amount of progress. It was motivated by development in various sectors, including economic development policy stipulated in the broad outlines of the nation's direction and the five year development and various kinds of other economic policies as well. Although there were a lot of progress which was shown by high economic growth, there are also still many challenges or economic problems in Indonesia. In reality, business opportunities created during the past three decades have not been able to make the whole population to afford and to participate in the development of various economic sectors.

The development of private business during that period, on one hand was marred by all kinds of inefficient government policies that caused market distortion. On the other hand, the development of private business in reality occurred mostly due to the condition of unfair business competition. The above phenomena was developed and supported by a close relationship between the decision makers and business actors. Furthermore, the business actors having close relationship to ruling elite, acquired excessive facilities that created a social gap. The emergence of conglomerate and a small group of strong business actors without being supported by a spirit of true entrepreneurship was one of the factors that caused the economic stamina to become very fragile and unable to compete.

Due to the bad climate on business competition and the need to provide equal protection and to create a fair business competition, the government of Indonesia and the Indonesian parliament agreed to enact the Law number 5 of 1999 concerning the prohibition on monopolistic practices and unfair business competition.

Objectives

Indonesian business actors in doing their business shall be based on economic democracy with due attention to the equilibrium between the business actors' interest and the public interests. Considering the principle of the philosophy on Indonesian competition policy, the objectives of the Indonesian competition law are:

a. to safeguard the interests of the public and to improve economic efficiency as one of the efforts to improve the people's welfare;
b. to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large , middle and small-scale undertakings in Indonesia;

c. to prevent monopolistic practices and/or unfair/unhealthy business competition that may be committed by undertakings, and

d. the creation of effectiveness and efficiency in business activities.

The Substance of the Act Number 5 of 1999

The substance of the Indonesian competition law which is under the coverage of the Act Number 5 of 1999 are:

A. Prohibited Agreements

This chapter covers Oligopoly, Price Fixing, Price Discrimination, Resale Price Maintenance, Market Allocation, Boycott, Cartels, Trust, Oligopsony, Vertical Integration, Exclusive Dealing or Closed Agreement.

Most of business practices are placed under the coverage of ride of reason approach. Only a few of the articles are considered as per se illegal; one of which is price fixing. Further more, agreement among business actors which may be considered as oligopoly is if two or three business actors or a group of business actors jointly control production and/or marketing of goods and/or services more than 75% of the market share of a certain type of goods or services. The 75% of the market share in this article is only a presumption.

B. Prohibited Activities

This chapter covers monopoly, monopsony, market control, predatory pricing, conspiracy. Like oligopoly, the criteria to decide whether there is a monopoly or monopsony are only presumption.

C. Dominant Position

This chapter covers interlocking directorate, share ownership, merger and acquisition. Business actors shall have a dominant position if a business actor or a group of business actors controls 50% of market share or more, or two or three business actors or group business actors control 75% or more of the market share.

D. Business Competition Supervisory Commission

This chapter covers the Commission status, membership, duties and its authority.

E. Procedure in Handling Business Competition Cases

F. Sanction/Punishment

This chapter covers administrative action, criminal penalties and additional criminal penalties.

G. Other Provisions

Exempted from the provisions of this act are

a. actions and/or agreements with the intention to implement the existing law;
b. agreements related to intellectual property rights such as licence, patent, trademark, copyright, industrial product design, integrated circuit and trade secrets, and agreements related to franchise; or
c. agreements on technical standardisation of products of goods and/or services which do not restrict and/or hamper competition; or
d. agreements for a distribution purpose which do not stipulate to re-supply of goods and/or services with the price lower than the price agreed upon in the agreement; or
e. agreement of research cooperation for the purpose of promoting or improving the living standards of the people in general; or
f. international agreements which have been ratified by the government of the Republic of Indonesia; or
g. agreement and/or actions intended to export wl ich do not distract domestic trade and/or market supply; or
h. undertakings categorized engaging in small-scale business; or
i. co-operative business activities serving specifically only for its member

Sources of Legislation

Model Law on Restrictive Business Practices issued by UNCTAD (Rev 5) and other legislation from other countries.

II. COMMENTARY BY THE GOVERNMENT OF NEW ZEALAND ON NEW ZEALAND'S COMPETITION LEGISLATION

A. Reasons for the introduction of the legislation

New Zealand's primary competition laws were enacted in 1986, but there have been a variety of such laws since 1905. Between 1958 and 1986 the trade practices law was based primarily on United Kingdom legislation. This type of legislation was formalistic, consisting of lists of practices that could be investigated, and generally only preventing those considered contrary to the public interest.

A change of approach was made with the enactment of the Commerce Act 1986 and the Fair Trading Act 1986. These Acts were developed during a period of wide ranging reforms designed to increase the competitiveness and efficiency of the New Zealand economy by reducing government control and direct regulation of business activity. The aim of the legislation was to ensure that private regulation did not replace the recently removed public regulation of markets.

The new approach was to avoid industry-specific regulations as much as possible and to rely on general rules that apply across all sectors. The Commerce Act has general prohibitions on arrangements or practices that have an anticompetitive purpose or effect. The Fair Trading Act contains provisions relating to deceptive conduct, unfair practices, and standards for safety and consumer information.

B. Objectives of the legislation

The objective of the Commerce Act 1986 is to promote competition in markets in New Zealand for the long term benefit of consumers. It seeks to achieve this objective through legislation which:

- prohibits the establishment or operation of business arrangements which substantially lessen competition;
- prohibits firms from taking advantage of a substantial degree of market power for anticompetitive purposes;
- provides for the scrutiny of mergers and takeovers to prevent a substantial lessening of competition; and,
- provides for price control in markets where there is an absence of competition.

The Act has a presumption in favour of competition because pro-competitive practices usually increase efficiency and therefore increase overall consumer welfare. However, practices can be authorised if it is shown that there are public benefits that outweigh the anticompetitive detriments.

The objective of the Fair Trading Act is to ensure that consumers receive appropriate and accurate information that they need to make informed choices, which are a necessary prerequisite to competition in the marketplace. The Act also protects ethical traders, as such traders are detrimentally affected when their competitors engage in deceptive or unfair trading practices.

C. Practices subject to control

(i) Restrictive Trade Practices

Sections 27 and 28 in Part II of the Commerce Act prohibit contracts, arrangements, or understandings that have the purpose, effect or likely effect of substantially lessening competition.

Section 29 prohibits contracts, arrangements, or understandings between competitors that contain exclusionary provisions unless it can be shown that the provision does not substantially lessen competition. Contracts, arrangements, or understandings that fix, control, or maintain the prices of goods or services are deemed to substantially lessen competition by sections 30 and 34. Sections 37 and 38 prohibit resale price maintenance.

Any of these anticompetitive arrangements may be authorised by the Commerce Commission if it is shown that the public benefits outweigh the anticompetitive detriments.

Section 36 provides that no person who has a substantial degree of market power shall take advantage of that power for the purpose of restricting entry into a market, preventing or deterring any person from engaging in competitive conduct in a market, or eliminating any person from a market. Such conduct can not be authorised.

Part II of the Commerce Act does not contain prohibitions against monopolisation. Monopoly power is permitted, but anticompetitive use of that power is not.

Sanctions for contraventions of the restrictive trade practice provisions include:

- pecuniary penalties of up to $10 million or 3 times the illegal gain for bodies corporate, and up to $500,000 on an individual (who may not be indemnified in respect of those penalties in the case of contraventions of section 30);
- injunctions or cease and desist orders restraining companies or individuals from conduct that breaches the Act; and
- awards of compensatory and exemplary damages to any person who has suffered loss or damage by a breach of the Act.

(ii) Business Acquisitions

Acquisitions of shares or assets of a business are prohibited under Part III of the Commerce Act if the transaction has the effect, or would be likely to have the effect, of substantially lessening competition.

The Act provides a system of voluntary pre-notification of business acquisitions. Parties may apply to the Commerce Commission for a clearance or authorisation before proceeding with a business acquisition. A clearance confirms that the acquisition will not result in substantially lessening competition. An authorisation allows anticompetitive acquisitions that result in net benefits to the public. The Commission has 10 working days in which to decline or grant a

clearance, and 60 working days to decline or grant an authorisation. These timeframes may be extended with the agreement of the applicant and the Commerce Commission.

Failure to gain a clearance or an authorisation does not make implementation of an acquisition unlawful, but will mean that it may be subject to legal challenge by the Commission or third parties.

Sanctions for contraventions of Part III of the Act include:

- pecuniary penalties of up to $5 million for bodies corporate and up to $500,000 for an individual;
- injunctions or cease and desist orders to prevent acquisitions from taking place;
- orders for a person or company to divest specified assets or shares; and
- awards of compensatory damages to any person who has suffered loss or damage for breaches of the Act.

(iii) Consumer Protection

The Fair Trading Act 1986 prohibits misleading or deceptive conduct, false representations, unfair practices and substandard goods and services. The prohibitions are not limited to dealings with consumers but also include transactions between businesses.

The main provisions are the following:

- people in trade are prohibited from engaging in misleading or deceptive conduct generally (section 9);
- certain types of false or misleading representations are prohibited, including about employment (section 12), goods or services, including false claims that goods or services are of a particular price, standard, quality, origin or history or that they have particular uses or benefits or that they have any particular endorsement or approval (section 13);
- certain unfair trading practices are prohibited, including pyramid selling, referral selling, and bait advertising (sections 17 to 24); and
- consumer information and product safety standards are specified (sections 27 to 33).

Breach of the Fair Trading Act may result in a fine, injunction or awards of compensatory damages. The Courts may also order corrective advertising or statements at the expense of the person or company that breached the Act. Other civil orders may be made declaring any contract or part of a contract to be void, varying a contract, or directing a person to refund money or to pay compensation.

D. Scope of the application of the legislation

(i) Liable Persons

Section 3(1A) provides that the Commerce Act applies to markets in New Zealand for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.

Penalties, damages, or injunctions may be sought against persons who contravene the decisions relating to restrictive trade practices and business acquisitions.

Penalties, damages, or injections may also be sought against those persons who aid, abet, counsel, induce or attempt to induce, or conspire with, or are in any way, directly or indirectly, knowingly concerned in or are a party to a contravention by another person.

(ii) Exemptions

Application to the Crown is limited to instances where the Crown engages in trade, except that the Crown shall not be liable to pay a pecuniary penalty and shall not be liable to be prosecuted for an offence under the Act.

Practices which are specifically authorised by other statutes or by orders in council are exempted from the trade practices prohibitions in Part II of the Commerce Act. In addition, there are exemptions for agreements restricting competition between partners; agreements between interconnected bodies corporate; agreements to protect the goodwill of a business being sold; agreements to comply with product quality standards; agreements relating to remuneration, conditions of employment, hours of work, or working conditions of employees; agreements relating exclusively to exports from New Zealand; and actions undertaken by groups of consumers.

Further exemptions apply to provisions relating exclusively to the carriage of goods to and from New Zealand by sea, and to conduct in accordance with a statutory intellectual property right.

(iii) Extra-territorial Application

Section 4 of the Commerce Act extends the application of the Act to any conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

There are also specific provisions extending the application of the Act to trans-Tasman abuses of market power. These provisions reflect a Closer Economic Relations agreement between New Zealand and Australia, which has led to the dismantling of most government-imposed barriers to trade between the countries. Accordingly, there is an increasing volume of trans-Tasman trade and business acquisitions that have effects on the competitive process in both countries.

The legislation provides for cooperation between the Commerce Commission and the Australian Trade Practices Commission in relation to the investigation of anticompetitive conduct occurring in one country and affecting a market for goods in the other country. Under sections 98H(2) and 99A of the Commerce Act the two Commissions may receive information and documents on behalf of each other. The Evidence Act 1908, the Judicature Act 1908, and the Reciprocal Enforcement of Judgments Act 1934 have been amended to allow the courts in each country to assist the other in hearing cases relating to anticompetitive practices. The Australian courts can serve subpoenas in New Zealand, and vice-versa. Submissions to the court

can be made by video-link or telephone, and judgments, orders, and injunctions are readily enforceable by either court. In addition, the relevant court will be able to sit in the other country in appropriate cases.

(iv) Existence and Effect of Agreements

The provisions prohibiting practices that substantially lessen competition generally refer to contracts, arrangements, and understandings. A "contract" means an agreement enforceable at law. "Arrangements and understandings" describe something less than a formal contract, such as an arranged plan which may not be enforceable at law.

Two elements are required – there must be a "meeting of minds", shown by some form of communication between the parties, and some indication of intention or expectation to act in a certain way. Conduct is an important indicator, and may include evidence of parallel conduct, similar pricing structures, joint action, opportunities for the parties to reach an understanding (such as industry meetings), or evidence of collusion between the parties.

E. Enforcement machinery

Public enforcement of competition law is the responsibility of the Commerce Commission. The Commission may initiate an investigation into an alleged breach of the Commerce Act either following a complaint or as a result of its own surveillance activities. Investigations are similar to criminal enquiries.

The Commission has the following investigation powers:

- power to obtain information by requiring persons to furnish in writing certain information, to produce certain documents; or to appear before the Commission to give evidence;
- power to obtain and execute search warrants and to require assistance to locate the information required; and
- power to impose a confidentiality order.

Once an investigation has been concluded, and a breach has been found, the Commission has a number of enforcement options available to it to assist in achieving compliance. The Commission may:

- issue a warning;
- administratively settle with the party or parties who must agree to modify their behaviour and provide formal signed undertakings to this effect;
- seek an injunction or impose a cease and desist order restraining any person from activities that breach the Act; or
- initiate proceedings in the High Court.

Private individuals or bodies corporate may also take action in the High Court against breaches of the Commerce Act.

Commerce Act cases are civil proceedings. The High Court is empowered to receive statements, documents and information in evidence that would not otherwise be admissible where such evidence may assist the Court to deal effectively with the matter. In certain cases, High Court decisions can be appealed to the Court of Appeal.

F. Parallel and supplementary legislation

(i) Controlled goods or services

Parts IV and V of the Commerce Act provide for goods and services to be subject to price control. If any goods or services are declared to be controlled, the Commerce Commission may authorise the supply or acquisition of those goods or services subject to price, revenue or quality measures.

Part IVA of the Act provides for the Commerce Commission to impose price control on large electricity lines businesses on its own initiative, rather than make a recommendation to the Minister of Commerce. The Commission is to decide on thresholds for imposing price control for large electricity lines businesses. In addition, the Commission must check disclosed asset values of electricity lines businesses and conduct a review of the valuation methodologies, which is currently optimized deprival value.

(ii) Essential facilities

New Zealand primarily relies on the Commerce Act 1986 to regulate access to essential facilities. The Act is complemented by industry-specific information disclosure regulations designed to make transparent the performance of businesses with market power, and the threat of heavier handed regulation, such as price control, if monopoly power is abused.

There is however industry specific regulation in a number of sectors. The Electricity Industry Reform Act 1998 provides for the restructure of the electricity industry to facilitate competition and restrict relationships between electricity lines and supply businesses that may not be at arms length.

The Electricity Industry Act 2001 is primarily aimed at encouraging the electricity industry to develop its own solutions to ensure that electricity is delivered in an efficient, fair, reliable and environmentally sustainable manner to all consumers. However, if the industry fails to meet these objectives, the Act provides for the government to intervene and regulate to impose requirements. The regulation that may be imposed is wide reaching, and includes the establishment of an Electricity Governance Board which may make rules over the operation of electricity markets.

Further specific regulation in the telecommunications sector is pending.

(iii) International Co-operation

As a Member of the O.E.C.D., New Zealand complies with the 1986 Recommendations on international co-operation relating to the notification of investigations or proceeding to other

Member countries if their interest may be affected. The criteria are whether an investigation or proceeding relates to the conduct of a person resident or carrying business in another member country, or whether the conduct is likely to have an effect on competition in a market in another member country.

G. Further information

Requests for further information should be sent to:

The Director
Competition and Enterprise Branch
Ministry of Economic Development
P.O. Box 1473
Wellington
New Zealand

Phone No. (644) 472 0030
Fax No. (644) 499 1791
Website: med.govt.nz

or to the:

Commerce Commission
P.O. Box 2351
Wellington
New Zealand

Phone No. (644) 471 0180
Fax No. (644) 471 0771
Website: comcom.govt.nz

Publications

The Commerce Commission publishes brochures and pamphlets relating to the operation of the Commerce Act and the Fair Trading Act. Further information is available on the Commission website www.comcom.govt.nz.

III. COMMENTARY BY THE GOVERNMENT OF THAILAND ON THE COMPETITION LAW OF THAILAND

A. Development of Thailand Competition Law

The development of competition law in Thailand began with the enactment of the Price Fixing and Anti-Monopoly Act of 1979. The 1979 Act consists of two parts. The price fixing part and the anti-monopoly part. The anti-monopoly part of 1979 Act is aimed at promoting fair competition. It empowers the Central Committee to look after business structures that may create monopoly and conduct restrictive business practices. But since it created problems for enforcement, the Department of Internal Trade, who is in charged of the said Act, made the adjustment of the Act by separating it into 2 Acts: The Price of Goods and Services Act and the Competition Act. The Competition Act which came into effect on April 30, 1999 is emphasized on business conduct control.

B. Objective of the Act

The objective of the Business Competition Act of 1999 is to promote fair and free trade. Its principle is mainly to look after business practices.

C. Anti-Competitive Behaviors under the Act

Under the Act, the anti-competitive behaviours have been defined and divided into three main categories: the abuse of market domination, merger and other anti-competitive conducts.

(I) The Abuse of Market Domination

Its objective is to prohibit a business operator with market domination from advantageously utilizing his/her position or creating barrier to entry for other business operators. "A Business Operator with Market Domination" means one or more business operators in the market of any goods or services who have the market share and sales volume above the level that prescribed by the Competition Commission. The prohibited acts are as follows.

1. unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
2. unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving, or providing services or obtaining credits from other business operators;
3. suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than market demand;
4. intervening in the operation of business of other persons without justifiable reasons.

(II) The merger part of the Act is adopted to prevent merger that may lead to monopoly or unfair competition. The Act defined mergers which result in the amount of market share, sales volume, capital stocks or assets in excess of those specified by the Competition Commission may proceed the competition Commission grants approval.

(III) Prohibit a business operator from conspiring, colluding or collaborating with another business operator, which result in creating monopoly, reducing competition or restricting competition in any of the following manners.

1. fixing selling price of goods or services as a single price or as agreed or restricting the sale volume of goods or services;
2. fixing buying price of goods or services as a single price or as agreed or restricting the purchase volume of goods or services;
3. entering into an agreement with a view to having market domination or market control;
4. fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for goods or services or in order to prevent one party from participating in a bid or a tender for goods or services;
5. fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services to the exclusion of other business operators from competing in the distribution of such goods or services;
6. fixing geographical areas in which each business operator may purchase goods or services or fixing persons from whom business operators may purchase goods or services;
7. fixing the quantity of goods or services in which each business operator may produce, purchase, distribute or provide with a view to restricting the quantity to be lower than the market demand;
8. reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, whether the distribution is made at the same or at a higher price;
9. appointing or entrusting any person as a sole distributor or provider of the same goods or services or the same kind of goods or services;
10. fixing conditions or practice with regard to the purchase or distribution of goods or the provision of services in order to achieve the uniform or agreed practice.

In the case where it is commercially necessary that's any act under Section 27(5-10) be undertaken, the business operator shall seek prior approval from the Competition Commission.

(IV) The Act also deals with agreements between domestic and overseas business operators performing an activity which will restrict the freedom or opportunity of a person residing in the Kingdom from purchasing goods or services for his/her own use directly from business operators outside the Kingdom.

(V) In order to prevent any other behaviors, which may not be covered by the above provisions, the Act also prohibit a business operator from performing any act which are not free and fair competition and which results in destroying, impairing, obstructing or impeding or

restricting business operation of other business operators or preventing other persons from carrying out business or causing the cessation of business.

It can be seen that business practices controlled by the Business Competition Act of 1999 cover the practices, acts or behaviors in Section D, paragraph 3 and 4 of the Set of Principles and Rules.

D. Scope of application of the legislation

The 1999 Act does not apply to the act of central, provincial and local administration; state enterprises under the law on budgetary procedure; group of farmers, co-operatives or co-operative societies recognized by law that their businesses are operated for the benefit of the farmers; and businesses prescribed under the Ministerial Regulation.

The Competition Act, however, applies to the acts or behaviors that are committed in the Kingdom of Thailand as well as those that are committed outside the Kingdom but have effect in the Kingdom.

Generally speaking, the Competition Act was enacted without the dependent upon the existence of any agreement.

E. Enforcement Body

(I) The Competition Commission consists of the Minister of Commerce as Chairman, the Permanent-Secretary of the Ministry of Commerce as Vice-Chairman, the Director-General of the Department of Internal Trade as Member and Secretary, and the Permanent-Secretary of the Ministry of Finance, and no more than twelve other qualified persons as Members shall be responsible for the enforcement of the Act.

In addition, these qualified persons appointed as members must not be political officials, holders of political positions, executive members or holders of positions with the responsibilities in the administration of political parties. They shall hold office for a term of two years and not more than two consecutive terms in case they are re-appointed. The Commission shall have the powers and duties to consider complaints, to prescribe rules for dominant position, to consider an application for permission to merge business, or initiate the joint reduction or restriction of competition to give orders for suspension, cessation, correction, or variation of activities by business operators.

(II) Specialized sub-committee consists of not less than four and not more than six persons qualified in the matter concerned and having knowledge and experience in various fields such as law, science, engineering, pharmacology, agriculture, economics, commerce, accountancy, or business administration appointed by the Commission and a representative of the Department of Internal Trade as a member and secretary. The sub-committee shall have powers and duties to consider and give opinions about the conduct indicative of market domination, a merger of business, the reduction or restriction of competition; to consider and give opinion about the permission to merge business or initiate the reduction or restriction of competition; and the consider and give opinion in other matters as entrusted by the Commission.

(III) Inquiry sub-committee consists of one person possessing knowledge and experience in criminal case who is appointed from police officials or public prosecutors, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, and a representative of the Department of Internal Trade as a member and secretary. The sub-committees shall have powers and duties to conduct an investigation and inquiry in connection with the commission of the offences under this law.

(IV) Appellate committee consists of not more than seven qualified persons with knowledge and experience in law economics, business administration or public administration appointed by the Council of Ministers and officials from the Department of Internal Trade acts as secretary and assistant secretaries appointed by the Director General of the Department. The committee shall have powers and duties to consider and decided on the appeal against an order of the Commission and to issue an order suspending the execution of the order of the Commission requiring the business operator to suspend, cease, rectify or vary such act as market domination, merge of business or joint reduction or restriction of competition.

(V) Steps for implementing the Competition Act are as follows:

1. The office of the Competition Commission shall monitor the movement and oversee the conduct of business operator (which is done by the competent official or complaints of any business operators or consumers) and if an offence which is prohibited under the Act is found, it will be reported to the Commission.

2. The Commission will submit the matter to an inquiry sub-committee to find the facts and related evidence. The Commission may also submit the matter to the specialized sub-committee to consider and give opinions to the Commission.

3. The inquiry and the specialized sub-committees may submit opinions to the Commission to have a prosecution or non-prosecution order. Concurrently, the Commission may order business operators to suspend or cease such act.

4. In case of the Commission's prosecution order, the office of the Competition Commission will submit such opinions to the public prosecutor together with words of investigation for further proceedings.

(VI) Application for Permission and Considering of the Application

1. Considering the permission of mergers or jointly reducing or restricting of competition, the business operator shall provide adequate reasons for the act both in questions of fact and in questions of law;

2. Business operator and related person shall have opportunities to provide explanation and related evidence;

3. Business operator may reject the Competition Commission's consideration.

F. There is no parallel or supplementary legislation including treaties or understanding with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices.

G. There were 2 complaints recently that the Commission has made decision as follows:

I. Tying of Whisky and Beer

The Commission resolutions are the tying sale between Whisky and Beer occurred in subagent and wholesale level. The unreasonably fixing compulsory conditions requiring its customers to restrict purchase of Beer by a business operator having market domination violated Article 25(2) of the Trade Competition Act. Since the criteria for market dominance has not yet been approved by the Cabinet, Article 25(2) could not apply in this case. Therefore, the Commission ordered the Secretariat:

- To inform subagents that the tying sales of Beer was an inappropriate behavior and violate Article 25(2) of the Act so Beer Chang should cease that behavior.
- To monitor the movement of Whisky and Beer producers in particular and report to the Commission periodically.

II. Cable Television Monopoly

The Commission resolutions are as follows.

- Business operation of the UBC group (Cable Television Company) is considered as a single unit so it did not violate Article 27(1) of the Competition Act. The reason is IBC(original) held 98% of UBC (original) and it has the same management team. This is not considered as concerted agreement which may violate Article 27(1) of the Trade Competition Act.

- The UBC Group is the sole business operator in Cable Television business and gain 100% market share which is considered as dominance. Raising prices of service packages by the UBC Group did not violate Article 25(1) since the company faced the financial problems due to Baht depreciation and company loss even if after the merge.

- Since the adjustment of service package and monthly fee is under the approval of the Mass Communication Organization of Thailand (MCOT) which is the Concession Grantor, MCOT should monitor the company's prices of service packages and the number of packages in order to provide more alternatives to consumers.

- The Committee ordered the Department of Internal Trade as a Secretariat to study the contract between the UBC Group and MCOT whether the operation of the UBC group is a State-own enterprise.

H. Bibliography citing sources of legislation and principal decisions as well as public dissemination

The Competition Act in Thailand is under Civil Law System. Thus, the commission decision will be based on the principles and objectives of the Act together with the facts which is case by case.

With regard to public dissemination, the government adopted manual and guidelines of the Act available to public and businessmen for its effective enforcement.

Legal Division
Department of Internal Trade
March, 2001

ANNEX I

INDONESIA

THE PEOPLE'S LEGISLATIVE ASSEMBLY
OF THE REPUBLIC OF INDONESIA

LAW OF THE REPUBLIC OF INDONESIA
NUMBER.....YEAR.....
CONCERNING
PROHIBITION OF MONOPOLISTIC PRACTICES
AND
UNFAIR BUSINESS COMPETITION

BY THE GRACE OF THE ALMIGHTY GOD
THE PRESIDENT OF THE REPUBLIC OF INDONESIA,

Considering:

a. whereas development in the field of economy must be directed towards the achievement of social welfare based on Pancasila and the 1945 Constitution;

b. whereas democracy in the field of the economy calls for equal opportunity for the every citizen to participate in the process of production and marketing of goods and/or services a fair, effective and efficient business environment, so as to be able to promote the growth of economy and the functioning of a reasonable market economy;

c. whereas anyone engaging in business in Indonesia must exist in an atmosphere of fair and natural competition, hence there shall be no concentration of economic power in the hands of certain business actors, notwithstanding the commitments or conventions executed by the State of the Republic of Indonesia with regard to International Conventions;

d. whereas in order to achieve the intentions mentioned in letters a, b and c herein, or DPR (People's Legislative assembly), a Law regarding the Prohibition of Monopolistic Practices and Unfair Business Competition needs to be set fourth;

In view of: Article 5 paragraph (1), Article 21 paragraph (1), Article 2 7 paragraph (2) and Article 33 of the 1945 Constitution,

With the approval of:

THE PEOPLE'S LEGISLATIVE ASSEMBLY OF THE REPUBLIC OF INDONESIA
HAS DECIDED TO: -

Stipulate: LAW REGARDING THE PROHIBITION OF MONOPOLISTIC

PRACTICES AND UNFAIR BUSINESS COMPETITION

CHAPTER 1
GENERAL PROVISIONS

Article 1

Referred to in this Law as:

1. Monopoly shall be the control over the production and/or marketing of goods and/or over the utilization of certain services by one business actor or by one group of business actors.
2. Monopolistic practices shall be the centralization of economic power by one or more business actors, resulting in the control of the production and/or marketing of goods and/or services by certain business actors thus resulting in unfair business competition and potentially harmful to the interests of the public.
3. The centralization of economic power shall be the actual control of a market by one or more business actors, enabling to determine prices of goods and/or services.
4. Dominant position shall be a situation in which a business actor has no substantial competitor in the market concerned in relation to the market segment controlled, or a business actor has the strongest position among its competitors in the market concerned in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services.
5. Business actors shall be any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field.
6. Unfair business competition shall be competition among business actors in conducting activities for the production and/or marketing of goods and/or services in an unfair or unlawful or anti-competition manner.
7. Agreement shall be the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing.
8. Conspiracy or business conspiracy shall be a form of cooperation conducted by one business actor with another with the intention of controlling the market concerned in the interest of the conspiring business actors.
9. Market shall be an economic institution in which sellers and buyers, either directly or indirectly, can conduct trading transactions of goods/or services.
10. The market concerned shall be the market related to certain marketing scope or substitute of such goods and/or services.
11. Market structure shall be a market condition comprising of indictors concerning aspects with significant impact on business actors' behaviour and market performance, among other things the number of sellers and buyers, barriers to entering and leaving the market, product variety, distribution system and control of market segment.
12. Market behaviour shall be acts undertaken by business actors in their capacity as suppliers or buyers of goods and/or services in order to achieve the company's objectives among other things to achieve profits, growth of assets, sales targets and competition methods applied.

13. Market share shall be the percentage of the value of sales or purchase of certain goods or services controlled by a certain business actor on the market concerned in a certain calendar year.
14. Market price shall be the price paid in transactions of goods and/or services in accordance with the agreement reached among the parties concerned on the market concerned.
15. Consumers shall be every user of goods and/or services, both for personal use or well as for the interests of other people.
16. Goods shall be any physical objects, either tangible or intangible, movable or immovable, which may be traded, used, utilized or exploited by consumers or business actors.
17. Services shall be services in the form of work or performance traded in society to be utilized by consumers or business actors.
18. Business Competition Supervisory Committee shall be a committee formed to supervise business actors in conducting their business activities so that they do not conduct monopolistic practices and/or unfair business competition.
19. The District Court shall be a court as intended in prevailing laws and regulations, at the legal domicile of the business of the business actors concerned.

CHAPTER II
PRINCIPLES AND PURPOSES

Article 2

Business activities of business actors in Indonesia must be based on economic democracy, with due observance of the equilibrium between the interests of business actors and the interests of the public.

Article 3

The purpose of enacting this Law shall be as follows:

a. to safeguard the interests of the public and to improve economic efficiency as one of the efforts to improve the people's welfare;
b. to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large-, middle- as well as small-scale business actors in Indonesia;
c. to prevent monopolistic practices and/or unfair business competition that may be committed by business actors; and
d. the creation of effectiveness and efficiency in business activities.

CHAPTER III
PROHIBITED AGREEMENTS

Part One
Oligopoly

Article 4

(1) Business actors shall be prohibited from entering into agreements with other business actors for jointly controlling the production and/or marketing of goods and/or services while may potentially cause the occurrence of monopolistic practices and/or unfair business competition.

(2) Business actors may be suspected or denied to be jointly involved in the control of the production and/or marketing of goods and/or services, as intended in Article (1) herein, if two or three business actors or a group of business actors Control over 75 % (seventy-five percent) of the market segment of a certain type of goods or services.

Part Two
Price Determination

Article 5

(1) Business actors shall be prohibited from entering into agreements with their business competitors for the determination of the price of certain goods and/or services payable by consumers or customers on the same market.

(2) The provisions intended in paragraph (1) of this Article shall not be applicable to the following:

a. an agreement entered into the context of a joint venture; or
b. an agreement entered into based on prevailing laws.

Article 6

Business actors shale be prohibited from entering into agreements forcing a buyer to pay a price which is different from that payable b), other buyers for the same goods and/or services.

Article 7

Business actor shall be prohibited from entering into agreements with their business competitors to determine prices below market prices, which may potentially result in unfair business competition.

Article 8

Business actors shall be prohibited from entering into agreements with other business actors setting forth the condition that parties receiving goods and/or services shall not sell or re-supply goods and/or services received by them, at a price lower than the contracted price, potentially causing unfair business competition.

Part Three
Division of Territory

Article 9

Business actors shall be prohibited from entering into agreements with their business competitors which have the purpose of dividing marketing territory or allocating the market for goods and/or services, potentially resulting in monopolistic practices and/or unfair business competition.

Part Four
Boycott

Article 10

(1) Business actors shall be prohibited from entering into agreements with other business actors which could prevent other business actors from engaging in the same business, either for domestic or overseas market purposes.

(2) Business actors shall be prohibited front entering into agreements with other business actors for refusing to sell any goods and/or services from other business actors, so that such act:

a. causes a loss or may be suspected of potentially causing a loss to other business actors; or
b. limits other business actors in selling and or buying any goods and/or services from the market concerned.

Part Five
Cartels

Article 11

Business actors shall be prohibited from entering into agreements with their competing business actors, with the intention of influencing prices by arranging production and/or marketing of certain goods and/or services, that may result in monopolistic practices and/or fair business competition.

Part Six
Trust

Article 12

Business actors shall be prohibited from entering into agreements with other competing business actors for cooperation by establishing a joint company or a larger company, by keeping and maintaining the continuity of each company or its member, with the aim of controlling production and/or marketing of goods and/or services, which may result in monopolistic practices and/or unfair business competition.

Part Seven
Oligopsony

Article 13

(1) Business actors shall be prohibited from entering into agreements with other business actors with the aim of jointly controlling the purchase or acquisition of supplies for controlling prices of goods and/or services on the market concerned, which may result in monopolistic practices and/or unfair business competition.

(2) Business actors shall be reasonably suspected or deemed to be jointly controlling the purchase or acquisition of supplies as intended in paragraph (1) of this Article if two or three business actors or a group of business actors control over 75 (seventy-five percent) of the market segment of a certain type of goods or services.

Part Eight
Vertical Integration

Article 14

Business actors shall be prohibited from entering into agreements with other business actors with the intention of controlling the production of several goods which are products included in the production chain of certain related goods and/or services where each product link is the end product of the production process or of further processing, either in one direct link or indirect link, which may potentially result in unfair business competition and/or harmful to society.

Part Nine
Closed Agreements

Article 15

(1) Business actors shall be prohibited front entering into agreements with other business actors, stipulating that the party receiving the goods and/or services shall only re-supply or not re-supply the aforementioned goods and/or services to certain parties and/or at a certain place.

(2) Business actors shall be prohibited from entering into agreements with other parties stipulating that the party receiving certain goods and/or services must bc prepared to buy other goods and/or services of the supplying business actor.

(3) Business actors shall be prohibited from entering into agreements concerning prices or certain price discounts for goods and/or services, stipulating that the business actor receiving goods quid/or services from the supplying business actor:

a. must be prepared to buy other goods and/or services from the applying business actor; or
b. shall not buy), the same or similar goods and/or services from other business actors, competitors of the supplying business actor.

Part Ten
Agreement With Foreign Parties

Article 16

Business actors shall be prohibited from entering into agreements with foreign parties setting forth conditions that may result in monopolistic practices and/or unfair business Competition.

CHAPTER IV
PROHIBITED ACTIVITIES

Part One
Monopoly

Article 17

(1) Business actors shall be prohibited from controlling the production and/or marketing of goods and/or services which may result in monopolistic practices and/or unfair business competition.

(2) Business actors may be reasonably suspected or deemed to control the production and/or marketing of goods and/or services as intended in paragraph (1) of this article in the following events:

(a) there is no substitute available yet for the goods and/or services concerned: or
(b) causing other business actors to be unable to enter into business competition for the same goods and/or services; or
(c) one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services.

Part Two
Monopsony

Article 18

(1) Business actors shall be prohibited from controlling the acquisition of supplies or from acting as sole buyer of goods and/or services on the market concerned which may potentially result in monopolistic practices and/or unfair business competition.

(2) Business actor shall be reasonably suspected of controlling the acquisition of supplies or acting as sole buyer as intended in paragraph (I) of this article if a business actor controls over 50% (fifty per cent) of the market segment of a certain type of goods or services.

Part Three
Market Control

Article 19

Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and/or unfair business competition, in the following forms:

a. refuse and/or impede certain other business actors in conducting the same business activities on the market concerned; or
b. bar consumers or customers of their competitors from engaging in business relationship with such of their competitors; or
c. limit the distribution and/or sales of goods and/or services on the market concerned; or engage in discriminative practices towards certain business sectors.

Article 20

Business actors shall be prohibited from supplying goods and/or services by selling while making a loss or by determining extremely low prices with the aim of eliminating or ruining the business of their competitors on the market concerned which may potentially result in monopolistic practices and/or unfair business competition.

Article 21

Business actors shall be prohibited from engaging in unfair practices in determining production and other costs as part of the price component of goods and/or services which may potentially result in unfair business competition.

Part Four
Conspiracy

Article 22

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may potentially result in unfair business competition.

Article 23

Business actors shall be prohibited front conspiring with other parties for obtaining information regarding the business activities of their competitors classified as company secret which may potentially result in unfair business competition.

Article 24

Business actors shall be prohibited from conspiring with other parties in order to impede the production and/or marketing o f goods and/or services of their competitors with the aim of causing the goods and/or services offers or supplied the market concerned become less, either in quantity, quality or in timeliness required.

CHAPTER V
DOMINANT POSITION

Part One
General

Article 25

(1) Business actors shall be prohibited from using dominant position either directly or indirectly to:

(a) determine the conditions of trading with the intention of preventing and/or barring consumer from obtaining competition goods and/or services, both in terms of price and quality; or

(b) limiting markets and technology developments; or

(c) bar other potential business actor from entering the market concerned

(2) Business actors shall have a dominant position as intended in paragraph (1) of this article in the following events:

(a) if one business actor controls over 50% (fifty per cent) of the market segment of certain type of goods or services; or

(b) if two or three business actors or a group of business actors control over 75% (seventy-five percent) of the market segment of a certain type of goods or services.

Part Two
Multiple Positions

Article 26

A person concurrently holding the position as a member of the Board of Directors or as a Commissioner of a company shall be prohibited from simultaneously holding position as a member of the Board of Directors or commissioner in other companies, in the event that such companies.

a. are in the same market segment; or
b. have a strong bond in the field and/or type of business activities; or
c. are jointly), capable of controlling the market share of certain goods and/or services which may potentially result in monopolistic practices and/or unfair business competition.

Part Three
Share Ownership

Article 27

Business actors shall be prohibited from owing majority shares in several similar companies conducting business activities in the same field on the same market, or establishing several companies with the same business activities in the same market, if such ownership causes:

a. one business actor or a group of business actors to control over 50% (fifty per cent)of the market segment of certain type of goods or services;
b. two or three business actors or a group of business actors to control over 75 (seventy-five per cent) of the market segment of a certain type of goods or services.

Part Four
Mergers, Consolidations and Acquisitions

Article 28

(1) Business actors shall be prohibited from conducting mergers or consolidations of business entities resulting in monopolistic practices and/or unfair business competition.

(2) Business actors shall be prohibited Pro m conducting the acquisition of shares in other companies if such action may result in monopolistic practices and/or unfair business competition.

(3) Further provision regarding the prohibition of mergers or consolidations of business entities as intended in paragraph (1) of this article and provisions concerning the acquisition of shares in companies as intended in paragraph (2) of this article shall be set forth in a government regulation.

Article 29

(1) The committee must be notified of mergers or consolidations of business entities, or acquisition of shares as intended in Article 28 resulting in the assets value and/or selling price thereof exceeding a certain amount, by no later than 30 (thirty) days from the date of such merger, consolidation or acquisition.

(2) Provisions regarding the determination of assets value and/or the selling price as well as the procedure for giving notice as intended in paragraph (1) of this article shall be stipulated in a government regulation.

CHAPTER V1
BUSINESS COMPETITION SUPERVISORY COMMITTEE

Part One
Status

Article 30

(1) For the supervision of the implementation of this law, a Business Competition Supervisory Committee shall be formed, hereinafter referred to as the Committee.

(2) The Committee shall be an independent institution free from the Government's and other parties' influence and authority.

(3) The Committee shall be responsible to the President.

Part Two
Membership

Article 31

(1) The Committee shall consist of a Chairperson acting concurrently as member, and of not less than 7 (seven) members

(2) Members of the Committee shall be appointed and dismissed by the President upon the approval of the People's Legislative Assembly.

(3) The Members of the Committee shall be appointed for a term of office of 5 (five) and they shall be eligible for reappointment for 1 (one) subsequent term of office.

(4) If due to the expiration of the term of office a vacancy occurs in the Committee's membership, the term of office of members may be extended until new members are appointed.

Article 32

Requirements for membership in the Committee shall be as follows:

a. citizens of the Republic of Indonesia, at least 30 (thirty) years of age and not older than 60 (sixty) years at the time of appointment.
b. Loyal to Pancasila and the 1945 Constitution;
c. Believers in the devout to The Almighty God;
d. Honest, fair and having good conduct;
e. Residing with the territory of the Republic of Indonesia;
f. Experienced in the field of business or possessing knowledge and expertise in
g. the field of law and/or economics.
h. Has never been imposed a criminal penalty;
i. Has never been declared bankrupt by a court of justice; and
j. Is not affiliated with a certain business entity.

Article 33

Membership in the Committee shall terminate due to the following reasons:

a. demise; or
b. resignation upon own request; or
c. residing outside the territory of the State of the Republic of Indonesia; or
d. continuous physical or mental illness; or
e. expiration of term of membership in the committee; o r
f. dismissal.

Article 34

(1) The formation of Committee and its organisational structure, duties and functions shall be stipulated by a Presidential decree.

(2) For the uninterrupted implementation of its duties, the Committee shall be assisted by a secretariat.

(3) The Committee may form a working group.

(4) Provisions regarding the organisational structure, duties and functions of the secretariat and working Group shall be further regulated by a decision of the Committee.

Part Three
Duties

The duties of the Committee shall include the following:

a. Evaluate agreements that may potentially result in monopolistic practices and/or unfair business competition as set forth in Article 4 up to and including Articles 16;
b. Evaluate business activities and/or actions of business actors which may potentially result in monopolistic practices and/or unfair business competition as stipulated in Article 17 up to and including Article 24;
c. Evaluate the existence of misuse of dominant position which may potentially result in monopolistic practices and/or unfair business competition set forth in Article 25 up to and including Article 28;
d. Undertake actions in accordance with the authority of the Committee as set forth in Article 36;
e. Provide advice and opinion concerning Government policies related to monopolistic practices and/or publications related to this law;
f. Prepare guidelines and/or publications related to this law;

Submit periodic reports on the results of the Committee's work to the President and the People's Legislative Assembly (DPR).

Part Four
Authority

Article 36

The Committee's authority shall include the following:

a. receive reports from the public and/or business actors regarding allegations of the existence of monopolistic practices and/or unfair business competition;
b. conduct research concerning, the possibility of the existence of business activities and/or actions of business actors which may result in monopolistic practices and/or unfair business competition;
c. Conduct investigation and/or inspection in allegations of cases of monopolistic practices and/or unfair business competition reported by the public or by business actors or discovered by the Committee as a result of its research;
d. Make conclusion regarding the results of its investigation and/or inspection as to whether or not there are any monopolistic practices and/or unfair business competition;
e. summon business actors suspected of having violated the provisions of this law;
f. summon and invite witnesses, expert witnesses and any person deemed to have knowledge of violations of the provisions of this law;
g. seek the assistance of investigator to invite business actors, witnesses, expert witnesses or any person as intended in Letters e and f of this article, who are not prepared to appear upon the Committee's invitation;

h. request the statement of Government institutions related to the investigation and/or hearing of business actors in violation of the provisions of this law;
i. obtain, examine and/or evaluate letters, documents or other instruments of evidence for investigation and/or hearing;
j. determine and stipulate the existence or non-existence of losses on part of business actors or society;
k. announce the Committee's decision to business actors suspected of having engaged in monopoly practices and/or unfair business competition;
l. impose administrative sanctions on business actors violating the provisions of this law.

Part Five
Funding

Article 37

The expenses related to the performance of the duties of the Committee shall be charged to the State Revenues and Expenditures Budget and/or other sources permissible by virtue of the applicable laws and, regulations.

CHAPTER VII
DISPUTE SETTLEMENT PROCEDURE

Article 38

(1) Any person having L knowledge of the occurrence of or reasonably suspecting that a violation of ibis law has occurred, he can report it in writing to the Committee with a clear statement concerning the occurrence of violation, attaching the identity of the reporting, party.

(2) The party suffering losses as a result of violations of this law may file a written report to the Committee with a complete and clear statement regarding the occurrence of violation and losses inflicted, attaching the identity of the reporting party.

(3) The identity of the reporting party intended in paragraph (1) of this article must be kept confidential by the Committee.

(4) The reporting procedure as intended in paragraph (1) and paragraph (2) of this article shall be further stipulated by the Committee.

Article 39

(1) Based on the report as intended in Article 38 paragraph (1) and paragraph (2), the Committee shall be obligated to conduct a preliminary investigation, and within 30 (thirty) days after receiving the report concerned, the Committee shall be obligated to determine whether or not further investigation is required.

(2) In further investigation the Committee shall be obligated to investigate the business actors against whom the report was submitted.

(3) The Committee shall be obligated to keep confidential the information obtained from business actors classified as company secret.

(4) If deemed necessary, the Committee may hear the testimony of witnesses, expert witnesses, and/or other parties.

In conducting activities as intended in paragraph (2) and paragraph (4) of this article, members of the Committee shall be provided with a warrant.

Article 40

(1) The Committee may conduct investigation of business actors if there is an allegation of the occurrence of violation of this law even though no report is filed.

(2) Investigation as intended in paragraph (1) of this article shall be conducted in compliance with the procedure stipulated in Article 3 9.

Article 4l

(1) Business actors and/or other parties examined shall be required to submit instruments of evidence required in the investigation and/or hearing.

(2) Business actors shall be prohibited front refusing to be heard, from refusing to provide information required for investigation and/or hearing, or from impeding the investigation and/or hearing process.

(3) Violations of the provisions of paragraph (2) of this article shall be submitted by the Committee to the investigator for conducting investigation in accordance with the prevailing provisions.

Article 42

Instruments of evidence in the investigation by the Committee shall be in the form of:

a. witness testimonies
b. experts testimonies
c. letters and/or documents
d. information
e. statement by business actors

Article 43

(1) The Committee shall be obligated to complete follow-up it) investigation within 60 (sixty) days from the time a follow-up investigation is conducted as intended in Article 3 9 paragraph (l).

(2) If required, the time frame for follow-u p investigation as intended in paragraph (1) of this article may be extended by not more than 30 (thirty) days.

(3) The Committee shall be obligated to determine whether or not a violation of this law occurred within 30 (thirty) days front the competition of the follow-up investigation as intended in paragraph (1) or paragraph (2) of this article.

(4) The decision of the Committee as intended in paragraph (3) of this article trust be read out in a hearing open to the public and the business actor concerned must be notified forth with thereof.

Article 44

(1) Within 30 (thirty) days from the time business actor concerned receives notice about the Committee's decision as intended in Article 43 paragraph (4), the business actor concerned shall be obligated to implement such decision and to submit an implementation report to the Committee.

(2) Business actors may appeal to the District Court by no later than 14 (fourteen) clays after receive notification of the aforementioned decision.

(3) Business actors not appealing within the time frame as intended in paragraph (2) of this article shall be deemed to have accepted the Committee's decision.

(4) In the event that the provisions of paragraph (1) and paragraph (2) of this article are not implemented by the business actor concerned, the Committee shall submit such decision to the investigator for conducting investigation in accordance with the provisions of prevailing laws and regulations.

(5) Decisions of the Committee as intended in Article 4 3 paragraph (4) shall serve as initial evidence sufficient for investigators to conduct investigation.

Article 45

(1) The District Court concerned must examine appeals by business actors as intended in Article 44 paragraph (2) within 14 (fourteen) days from the time the filing of such appeal is received.

(2) The District Court must make a decision within 30 (thirty) days from the commencement of the hearing of the aforementioned appeal.

(3) The party filing an appeal in respect of the decision of the District Court as intended in paragraph (2) of this article, may appeal to the Supreme Court of the Republic of Indonesia within 14 (fourteen) days.

(4) The Supreme Court must make a decision within 30 (thirty) days from the time the appeal is received.

Article 46

(1) In the event that there are no appeals, the decision of the Committee as intended in Article 43 paragraph (3) shall have permanent legal force.

(2) The executive enforcement of the decision of the Committee as intended in paragraph (1) of this article shall be requested of the District Court

CHAPTER VIII
SANCTIONS

Part One
Administrative Measures

Article 47

(1) The Committee shall be authorised to impose sanctions in the form of administrative measures against business actors violating the provisions of this law.

(2) Administrative measures as intended in paragraph (1) of this article may be in the following forms:

a. stipulations of declaring agreements intended in Article 4 up to and including Article 13, Article 15 and Article 16 as null and void; and/or
b. ordering business actors to stop vertical integration as referred to in Article 14; and/or
c. ordering business actors to stop activities proven to have been causing monopolistic practices and/or unfair business competition and/or being harmful to society; and/or
d. ordering business actors to stop the misuse of dominant position; and/or
e. determine the cancellation of mergers or consolidations of business entities and acquisition of shares as intended in Article 28; and/or
f. stipulation of compensation payment; and/or imposition of a minimum fine of Rp. 1,000,000,000, (Rupiah one billion) and a maximum fine of Rp. 25,000,000,000, (Rupiah twenty-five billion).

Part Two
Basic Criminal Sanctions

Article 48

(1) Violations of the provisions of Article 4, Article 9 up to and including Article l4, Article 1 G up to and including Article 19, Article 25, Article 27, and Article 28 of this law shall be subject to the criminal sanction of a fine of minimum Rp. 25,000,0 00,.000,- (Rupiah twenty-five billion) and maximum Rp. 100,000,000,000.- (Rupiah one hundred billion), or the criminal sanction of imprisonment as a replacement of fine for no longer than 6 (six) months.

(2) Violations of the provisions of Article 5 u11to and including Article 8, Article 15 Article 20 up to and including Article 24, and Article 26 of this law shall be subject to the criminal sanction of a fine of minimum Rp. 5,000,000.000, (Rupiah five billion) or Rp. 25,000,000,000,- (Rupiah twenty-five billion) or a criminal sanction of imprisonment as replacement of fine for no longer than 5 (five) months.

(3) Violation of the provisions of Article 4l of this law shall be subject to a fine of minimum Rp. 1,000,000,000.- (Rupiah one billion) and maximum Rp.5,000,000,000,- (Rupiah five billion) or the criminal sanction of imprisonment as replacement of the fine no longer than 3 (three) months.

Part Three
Additional Criminal Sanctions

Article 49

In compliance with the provisions of Article 10 of the Criminal Code, in addition to the sanctions set forth in Article 48 additional criminal sanctions may be imposed in the following of:

a. revocation of business license; or
b. prohibiting business actors proven to have violated this law from filling the positions of director or commissioner for at least 2 (two) years and for no longer than 5 (five) years; or ordering to stop certain activities or actions resulting in losses to other parties.

CHAPTER IX
MISCELLANEOUS PROVISIONS

Article 50

Not included in the provision of this law shall be as follows:

a. actions and or agreements intended to implement applicable laws and regulations; or
b. agreements related to intellectual property rights, such as licenses, patents, trademarks, copyrights, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or

c. agreements for the stipulation of technical standards of goods and/or services which do not inhibit, and/or impede competition; or
d. agency agreements which do not stipulate the re-supply of goods and/or services at a price level lower than the contracted price; or
e. cooperation agreements in the field of research for the upgrading and improvement of the living standard of society at large; or
f. international agreements ratified by the Government of the Republic of Indonesia; or
g. export oriented agreements and/or actions not disrupting domestic needs and/or supplies; or
h. business actors of the small-scale; or
i. activities of co-operatives aimed specifically at serving their members.

Article 51

Monopoly and/or concentration of activities related to the production and/or marketing of goods and/or services affecting the livelihood of society at large and branches of production of strategic nature to the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and/or institutions formed or appointed by the Government.

CHAPTER X
TRANSITIONAL PROVISIONS

Article 52

(1) As from the effectiveness of this law, all laws and regulations stipulating or related to monopolistic practices and/or business competition shall be declared as remaining in effect in so far as not contradictory or not superseded by new ones by virtue of this law.

(2) Business actors having entered into agreement and/or conducting activities and/or undertaking actions not complying with the provisions of this law shall be given 6 (six) months from this law's coming into effect to make adjustments.

CHAPTER XI
CLOSING PROVISIONS

Article 53

This law shall become effective within 1 (one) year as from its promulgation.

Stipulated in Jakarta

On.....

THE PRESIDENT OF THEE REPUBLIC OF INDONESIA
BACHARUDDIN JUSUF HABIBIE

Promulgated in Jakarta
On.....

STATE MINISTER SECRETARY OF STATE OF THE REPUBLIC OF INDONESIA
AKBAR TANDJUNG
STATE GAZETTE OF THE REPUBLIC OF INDONESIA YEAR ..... NUMBER.....

THE PEOPLE'S LEGISLATIVE ASSEMBLY OF
THE REPUBLIC OF INDONESIA

ELUCIDATION ON
THE LAW OF THE REPUBLIC OF INDONESIA
CONCERNING THE PROHIBITION OF MONOPOLISTIC
PRACTICES AND UNFAIR BUSINESS COMPETITION

GENERAL

Economic development in the First Long Term Development has resulted in much progress, among other things with the improvement of social welfare. The aforementioned progress achieved in development has been supported by development policies in various fields including policies in the field of economy as set forth in the General State Policy and Five Year Development Plan, as well as in various other economic policies.

Despite the substantial progress achieved in the First Long Term Development, reflected in high economic growth. Many challenges or issues still remain, parallel to globalization trends in the economy and the dynamics and development of private businesses since the early 1990s.

The business opportunities created during the last three decades have in fact not enabled all levels of society to participate in development in various economic sectors. The development of the private sector during the above mentioned period has on the one hand been marked by various forms of inadequate Government policies leading to market distortion. On the other hand, the development of the private sector has in fact been mainly the result of unfair business competition conditions.

The above described phenomenon has developed and has been supported by the relationship between decision makers and business actors, either directly or indirectly, leading to the further deterioration of the situation. The implementation of national economy has not quite adhered to the mandate of Article 33 or the 1945 Constitution, and has shown a very monopolistic tendency.

Businessmen close to the elite of power has obtained extreme facilities resulting in the creation of social gap. The emergence of conglomerates and a group of strong businessmen not supported by the spirit of real entrepreneurship has been one of the factors which caused the economic capacity to become extremely vulnerable and un-competitive.

The above situation and condition has caused us to have to study and rearrange business activities in Indonesia, so that businesses can grow and develop in a fair and appropriate way, leading to the creation of a fair business competition climate, and in order to avoid the concentration of economic power around one certain person or group, among other things in the form of monopolistic practices and unfair business competition harmful to society, which are contradictory to the ideals of social justice.

Therefore, it is necessary to stipulate the Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition intended for the enforcement of

provisions of law and providing equal protection for every business actor in an effort to create fair business competition.

This law provides guarantee of legal certainty for stimulating further a rapid economic development in an effort to improve social welfare, as well in implementation of the spirit and intentions of the 1945 Constitution.

For an effective implementation of this law and implementing regulations thereof in accordance with its principles and objectives, it is necessary to form a Business Competition Supervisory Committee, i.e. an independent institution free front the influence of the. Government and other parties, having the authority to conduct supervision of business competition and, to impose sanctions. Such sanctions shall be in the form of administrative measures, whereas criminal sanctions shall be under the authority of the court of justice.

In general, the substance of the Law Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition consists of 6 (six) regulatory parts such as:

1. prohibited agreements:
2. prohibited actions:
3. dominant position:
4. Business Competition Supervisory Committee:
5. Law enforcement
6. Miscellaneous provisions

This law has been drawn up based on the principles of Pancasila (State Philosophy) and the 1945 Constitution, and it has been based on economic democracy with due observance of equilibrium between the interests of business actors and public interest with the aim of: safe guarding public interest and protecting consumers; develop a conducive business climate through the creation of fair business competition, and ensure certainty in equal business opportunity for every person; preventing monopolistic practices and/or unfair business competition .created by business actors; and creating effectiveness and efficiency in business activities in the context of improving the efficiency of national economy as one of the efforts for improving social welfare.

ARTICLE BY ARTICLE

Article 1

Self-expianatory

Article 2

Self-explanatory

Article 3

Self-explanatory

Article 4

Self-explanatory

Article 5

Self-explanatory

Article 6

Self-explanatory

Article 7

Self-explanatory

Article 8

Self-explanatory

Article 9

Agreements may be vertical or horizontal in nature. These agreements are prohibited because business actors eliminate or reduce competition by dividing the market or market allocation. Marketing territory may mean the territory of the state of the Republic of Indonesia, for example regency, province, or other regional territory. Dividing marketing territory or market allocation means dividing territory in order to obtain or supply goods, services, or goods and services, determining parties front which goods, services, goods and services may be obtained or supplied.

Article 10

Self-explanatory.

Article 11

Self-explanatory.

Article 12

Self-explanatory.

Article 13

Self-explanatory.

Article 14

Referred to as controlling the production of a number of products being part of a production series which can be referred to as vertical integration shall be the control of a production process series of certain goods upstream to downstream or a process continuing for certain services by certain business actors. Even though vertical integration practices can result in low priced goods and services, these can cause unfair business competition which are harmful to economic cells in society. Such practices are prohibited in so far as they cause unfair business competition and or are harmful to society.

Article 15

Paragraph (1)

Supplying means making supplies available, either in the form of goods or services in the context of trading, lease, lease purchase and leasing activities.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Letter a

Self-explanatory.

Letter b

Article 16

Self-explanatory.

Article 17

Paragraph (1)

Self-explanatory.

Paragraph (2)

Letter a

Self-explanatory.

Letter b

Referred to as other business actors are business actors possessing significant competitive capacity in the market concerned.

Letter c

Self-explanatory.

Article 19

Letter a

Rejecting or impeding certain business actors may not be done unreasonably or for non-economic reasons, for example due to difference in ethnic group, race, social status, and others.

Self –explanatory

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Article 20

Self-explanatory.

Article 21

Unfair practices in determining production and other costs shall be violation of the prevailing laws and regulations for obtaining production factors lower than the actual.

Article 22

Tenders shall be bids submitted to contract certain work, for the procurement of goods, or the provisions of services.

Article 23

Self-explanatory.

Article 24

Self-explanatory.

Article 25

Self-explanatory.

Article 26

Letter a

Self-explanatory.

Letter b

Companies shall be closely related if such companies support each other or are directly related in the production, marketing, or production and marketing process.

Letter c

Self-explanatory.

Article 27

Self-explanatory.

Article 28

Paragraph (1)

Business entities shall be companies or forms of business, either incorporated as legal entities (e.g. limited liability companies) or not incorporated as legal entities, engaging in a type of business of permanent and continuous nature, with the aim of generating profits.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Self-explanatory.

Article 29

Self-explanatory.

Article 30

Self-explanatory.

Article 31

Paragraph (1)

The Chairperson and the Deputy Chairperson of the Committee shall be elected from among and by Members of the Committee.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Self-explanatory.

Paragraph (4)

Extension of the term of membership in the Committee in order to avoid vacancy may not exceed 1 (one) year.

Article 32

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Letter f

Self-explanatory.

Letter g

Not having been imposed with a criminal penalty means not having been imposed with a criminal penalty due to a capital criminal act or due to violation of moral.

Letter h

Self-explanatory.

Letter I

Not affiliated with a business entity means that as from the time the person concerned becomes member of the Committee, such person has not acted as:

1. Member of the Board of Commissioners or supervisors, or of the board of directors of a company.
2. Member of management or inspection body of a co-operative;
3. Party providing services to a company, such as consultant, public accountant and appraiser.
4. Majority shareholder in a company.

Article 33

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

To be stated in the form of a statement by an authorised physician.

Letter e

Self-explanatory.

Letter f

Terminated, among other things, for the reason of no longer meeting requirements for committee membership as intended in Article 32.

Article 34

Paragraph (1)

Self-explanatory.

Paragraph (2)

Secretariat shall be the organisational unit supporting or assisting the Committee in the implementation of its duties.

Paragraph (3)

Working unit shall be a professional team appointed by the Committee to assist in the implementation of certain tasks at a certain time.

Paragraph (4)

Self-explanatory.

Article 35

Self-explanatory.

Article 36

Self-explanatory.

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Letter f

Self-explanatory.

Letter g

Investigator shall be investigator as intended in Law Number 8 Year 1981.

Letter h

Self-explanatory.

Letter I

Self-explanatory.

Letter j

Self-explanatory.

Letter k

Self-explanatory.

Letter l

Self-explanatory.

Article 37

In principle the State is responsible for the operational implementation of the Committee's duties by providing support in the form of funding through the State Revenues and Expenditures Budget. However, bearing in mind the broad and various scope and field of the Committee's duties, the Committee may obtain funds from other sources not contradictory to the prevailing laws and regulations, which are not binding in nature and shall not have an impact on the Committee's independence.

Article 38

Self-explanatory.

Article 39

Self-explanatory.

Article 40

Self-explanatory.

Article 41

Paragraph (1)

Self-explanatory.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Submitted by the Committee to the investigators for investigation shall not only be criminal acts or actions as intended in paragraph (2) of this article, but also principal cases under investigation and caring by the Committee.

Article 42

Self-explanatory.

Article 43

Paragraph (1)

Self-explanatory.

Paragraph (2)

Self-explanatory.

Paragraph (3)

The Committee's decision making as intended in paragraph (3) of this Article shall be conducted in a Council meeting consisting of at least 3 (three) Committee members.

Paragraph (4)

Referred to as notification shall be forwarding an excerpt from the Committee's decision to the business actor concerned.

Article 44

Paragraph (1)

30 (thirty) days as from the receipt of the excerpt from the Committee's decision by the business actor concerned or his local proxy.

Paragraph (2)

Self-explanatory.

Paragraph (3)

Self-explanatory.

Paragraph (4)

Self-explanatory.

Paragraph (5)

Self-explanatory.

Article 45

Self-explanatory

Article 46

Self-explanatory.

Paragraph (I)

Self-explanatory.

Paragraph (2)

Letter a

Self-explanatory .

Letter b

Stopping vertical integration shall be, among other things by cancelling the agreement, transferring a party of the company to another business sector, or changing the form of production series.

Letter c

The termination of certain activities or actions shall be ordered, and not be the entire business activities of the business actor concerned.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Letter f

Indemnity shall be granted to the business actor concerned and to other parties having suffered a loss.

Letter g

Self-explanatory.

Article 48

Self-explanatory.

Article 49

Self-explanatory.

Article 50

Letter a

Self-explanatory.

Letter b

Self-explanatory.

Letter c

Self-explanatory.

Letter d

Self-explanatory.

Letter e

Self-explanatory.

Annex II

NEW ZEALAND

The analysis below of the Commerce Act 1986 and the Fair Trading Act 1986, as well as texts of these acts and of appropriate amendments acts are available at the Internet website http://www.knowledge-basket.co.nz.

Commerce Act 1986 005
Commenced: 1 May 1986

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3 Certain terms defined in relation to competition
4 Application of Act to conduct outside New Zealand
5 Application of Act to the Crown
6 Application of Act to Crown corporations
7 Law relating to restraint of trade and breaches of confidence not affected

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8 Establishment of Commission
9 Membership of Commission
10 Terms and conditions of appointment
11 Associate members
12 Deputy Chairman and acting Deputy Chairman
13 Termination of appointment of members
14 Disclosure of financial interests
15 Meetings of Commission
16 Chairman may direct Commission to sit in Divisions
17 Assent to determination
18 Officers of Commission
19 Money to be appropriated by Parliament for purposes of this Act
20 Funds of Commission
21 Bank accounts
22 Accounts and audit
23 Investment of money
24 Exemption from income tax
25 Functions of Commission in relation to dissemination of information
26 Commission to have regard to economic policies of Government

II: Restrictive Trade Practices
Practices Substantially Lessening Competition

27 Contracts, arrangements, or understandings substantially lessening competition prohibited
28 Covenants substantially lessening competition prohibited
29 Contracts, arrangements, or understandings containing exclusionary provisions prohibited

Price Fixing

30 Certain provisions of contracts, etc., with respect to prices deemed to substantially lessen competition
31 Joint venture pricing exempt from application of section 30
32 Certain recommendations as to prices for goods and services exempt from application of section 30
33 Joint buying and promotion arrangements exempt from application of section 30
34 Certain provisions of covenants with respect to prices deemed to substantially lessen competition

Practices Substantially Lessening Competition Conditional Upon Authorisation

35 Contracts or covenants subject to authorisation not prohibited under certain conditions

Use of Dominant Position in a Market

36 Use of dominant position in a market

Resale Price Maintenance

37 Resale price maintenance by suppliers prohibited
38 Resale price maintenance by others prohibited
39 Recommended prices
40 Withholding the supply of goods
41 Preventing the supply of goods
42 Special evidentiary provisions in respect of certain resale price maintenance practices
43 Statutory exceptions
44 Other exceptions
45 Exemptions in relation to copyright, patents, plant varieties, registered designs, and trade marks
46 Saving in respect of mergers or takeovers

III: Mergers and Takeovers

47 "Merger or takeover proposal" defined
48 Certain other terms defined
49 Application to building societies

50 Certain merger or takeover proposals require clearance or authorisation
51 Contracts subject to condition of clearance or authorisation

IV: Control of Prices
Declaration of Price Control

52 "Controlled goods or services" defined
53 Governor-General may impose price control in circumstances of restricted competition
54 Commission may report to Minister as to price control

Authorised Prices for Controlled Goods or Services

55 Controlled goods or services not to be supplied except in accordance with authorised price

Miscellaneous Provisions

56 Records to be kept for pricing purposes
57 Other Acts relating to price control not affected

V: Authorisations and Clearances
Restrictive Trade Practices

58 Commission may grant authorisation for certain restrictive trade practices
59 Authorisation not to be granted in relation to contracts, etc., made before determination by Commission
60 Procedure for applications for authorisation of restrictive trade practices
61 Determination of applications for authorisation of restrictive trade practices
62 Commission to prepare draft determination in relation to restrictive trade practices
63 Commission may grant provisional authorisation
64 Procedure at conference
65 Commission may vary or revoke authorisations

Merger or Takeover Proposals

66 Commission may grant clearances or authorisations for merger or takeover proposals
67 Commission may grant clearance or authorisation of merger or takeover proposal which has been implemented
68 Conferences in relation to merger or takeover proposals
69 Clearances and authorisations of mergers and takeover proposals to be notified to New Zealand Stock Exchange

Authorisation of Prices for Controlled Goods or Services

70 Authorised prices for controlled goods or services to be determined by Commission
71 Commission may authorise provisional price
72 Alternative undertakings as to prices of controlled goods or services

73 Considerations to be observed by Commission
74 Conferences in relation to authorisation of price for controlled goods or services

VI: Enforcement, Remedies, and Appeals
Jurisdiction of Courts

75 Jurisdiction of High Court
76 Jurisdiction of District Courts
77 Additional lay members of High Court for purposes of appellate jurisdiction in respect of Commission determinations

78 Lay members of High Court in certain cases
79 Evidence not otherwise admissible

Restrictive Trade Practices

80 Pecuniary penalties
81 Injunctions may be granted by Court for contravention of Part II
82 Actions for damages for contravention or Part II

Mergers and Takeovers

83 Contravention of section 50 an offence
84 Injunctions may be granted by Court for contravention of Part III
85 Court may order divestiture of assets in respect of contravention of Part III

Control of Prices

86 Contravention of section 55 an offence
87 Injunctions may be granted by Court for contravention of Part IV

Injunctions Generally

88 General provisions relating to granting of injunctions
89 Other orders
90 Conduct by servants or agents

Appeals From Determinations of Commission

91 Appeals in relation to determinations by Commission
92 Persons entitled to appeal
93 Determination of appeals
94 Court may refer appeals back for reconsideration
95 Provisions pending determination of appeal
96 Court may order proceedings to be heard in private
97 Appeal to Court of Appeal in certain cases

VII: Miscellaneous Provisions

98 Powers to obtain information, documents, and evidence
99 Powers of Commission to take evidence
100 Powers of Commission to prohibit disclosure of information, documents, and evidence
101 Notices
102 Service of notices
103 Failure to comply with notices, etc.
104 Determinations of Commission
105 Delegation by Commission
106 Proceedings privileged
107 Annual report
108 Regulations
109 Commission may prescribe forms
110 Repeals, revocations, savings, and consequential amendments
111 Transitional provisions in respect of certain contracts, arrangements, or understandings
112 Transitional provisions in respect of goods and services subject to price control under Commerce Act 1973
113 Transitional provisions in respect of goods and services subject to price restraint under regulations made under Commerce Act 1975
114 Transitional provisions in respect of milk pricing
115 Savings in respect of certain provisions of Commerce Act 1975
116 Winding up of Commerce Commission established under Commerce Act 1975
117 Members of Commerce Commission established under Commerce Act 1975 deemed to be members of Commission
118 Lay members of Administrative Division of High Court appointed pursuant to Commerce Act 1975 deemed to be lay members of Administrative Division of High Court appointed under this Act

Schedule(s)

1 FIRST SCHEDULE: Classes of Merger or Takeover Proposals Requiring Prior Clearance or authorisation by the Commission
2 SECOND SCHEDULE: Enactments Amended
3 THIRD SCHEDULE: Enactments Repealed
4 FOURTH SCHEDULE: Orders and Notices Revoked

Fair Trading Act 1986 121

Commenced: 1 Mar 1987

ANALYSIS

Analysis
Title

1 Short Title and commencement
2 Interpretation
3 Application of Act to conduct outside New Zealand
4 Application of Act to the Crown
5 Application of Act to Crown corporations
6 Functions of Commission in relation to dissemination of information
7 Money to be appropriated by Parliament for purposes of this Act
8 Annual report

I: Misleading and Deceptive Conduct, False Representations, and Unfair Practices

Misleading and Deceptive Conduct

9 Misleading and deceptive conduct generally
10 Misleading conduct in relation to goods
11 Misleading conduct in relation to services
12 Misleading conduct in relation to employment

False Representations

13 False representations
14 False representations and other misleading conduct in relation to land
15 Limited application of sections 9 to 14 of this Act to news media
16 Certain conduct in relation to trade marks prohibited

Unfair Practices

17 Offering gifts and prizes
18 Trading stamp schemes prohibited
19 Bait advertising
20 Referral selling
21 Demanding or accepting payment without intending to supply as ordered
22 Misleading representations about certain business activities
23 Harassment and coercion
24 Pyramid selling schemes
25 Provisions of this Part of this Act not limited by reference to other provisions of this Part of this Act
26 Importation of goods bearing false trade description or false trade mark prohibited

II: Consumer Information

27 Consumer information standards
28 Standards may be declared to be consumer information standards

III: Product Safety

29 Product safety standards
30 Standards may be declared to be product safety standards
31 Unsafe goods
32 Compulsory product recall
33 Importation of certain goods prohibited

IV: Safety of Services

34 Meaning of ``services"
35 Safety standards in respect of services
36 Standards may be declared to be services safety standards

V: Enforcement and Remedies
Jurisdiction of Courts

37 Jurisdiction of High Court
38 Jurisdiction of District Courts
39 Jurisdiction of Small Claims Tribunals

Offences

40 Contraventions of provisions of Part I, Part II, Part III, and Part IV an offence

Civil Proceedings

41 Injunctions may be granted by Court for contravention of Part I, Part II, Part III, and Part IV
42 Order to disclose information or publish advertisement
43 Other orders
44 Defences
45 Conduct by servants or agents
46 Finding in proceedings to be evidence

VI: Miscellaneous Provisions

47 Powers to obtain documents and inspect goods
48 Proceedings privileged
49 Repeals and consequential amendments
50 Saving of other laws

Schedule(s)

1 FIRST SCHEDULE: Enactment Amended
2 SECOND SCHEDULE: Enactments Repealed
3 THIRD SCHEDULE: Orders and Notices Revoked

Annex III

THAILAND

Tentative Translation

COMPETITION ACT, B.E. 2542 (1999)

Bhumibol Adulyadej, Rex.,
Given on the 22nd Day of March B.E. 2542;
Being the 54th Year of the Present Reign.

His Majesty King Bhumibol Adulyadej is graciously pleased to proclaim that:

Whereas it is expedient to have a law on competition by revising the rules relating to anti-monopoly provided in the law on price fixing and anti- monopoly;

Whereas it is aware that this Act contains certain provisions in relation to the restriction of rights and liberties of persons, in respect of which section 29, in conjunction with section 31, section 35, section 36, section 45, section 48 and section 50 of the Constitution of the Kingdom of Thailand so permit by virtue of the provisions law;

Be it, therefore, enacted by the King, by and with the advice and consent of the National Assembly, as follows:

Section 1. This Act is called the "Competition Act, B.E. 2542 (1999) "

Section 2. This Act shall come into force after thirty days as from the date of its publication in the Government Gazette.**

Section 3. In this Act:

"business" means an undertaking in agriculture, industry, commerce, finance, insurance, and services and shall include other undertakings prescribed by Ministerial Regulations;

"finance" means commercial banking under the law on commercial banking, finance and credit financier businesses under the law on operation of finance, securities and credit financier businesses, and securities business under the law on securities and securities exchange;

**Published in Government Gazette, Vol. 116, Part 22b, dated 31st March 1999.

"business operator" means a distributor, producer for distribution order or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business;

"goods" means an article capable of utilisation or consumption, including a document of title to an article;

"service" means the procurement of work by way of Commissionn, the granting of any right or the giving of permission to use or to have benefits in any property or any undertaking in return for monetary remuneration or other benefit but shall not include the hire of service;

"price" means a price of goods and shall also include remuneration for the performance of a service;

"business operator with market domination" means one or more business operators in the market of any goods or service who have the market share and sales volume above that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, having regard to the market competition;

"Commission" means the Competition Commission;

"member" means a member of the Competition Commission;

"Secretary-General" means the Secretary-General of the Competition Commission;

"competent official" means a Government official appointed by the Minister to perform activities under this Act;

"Minister" means the Minister having charge and control of the execution of this Act.

Section 4. This Act shall not apply to the act of:

(1) Central administration, provincial administration or local administration;

(2) State enterprises under the law on budgetary procedure;

(3) Farmers' groups, co-operatives or co-operative societies recognised by law and having as their object the operation of businesses for the benefit of the occupation of farmers;

(4) businesses prescribed by the Ministerial Regulation, which may provide for exemption from the application of this Act in whole or only in respect of any particular provision thereof.

Section 5. The Minister of Commerce shall have charge and control of the execution of this Act, provided that in respect of financial undertakings, the Minister of Commerce and the Minister of Finance shall jointly have charge and control, and shall have the power to appoint competent officials, issue Ministerial Regulations for the execution of this Act and issue Notifications hereunder.

Such Ministerial Regulations and Notifications shall come into force upon their publication in the Government Gazette.

CHAPTER I
Competition Commission

Section 6. There shall be the Competition Commission consisting of the Minister of Commerce as Chairman, Permanent-Secretary for the Ministry of Commerce as Vice-Chairman, Permanent-Secretary for the Ministry of Finance and not less than eight, but not more than twelve, qualified persons with knowledge and experience in law, economics, commerce, business administration or public administration appointed by the Council of Ministers, provided that at least one-half of whom must be appointed from qualified members in the private sector, as members and the Secretary-General shall be a member and secretary.

The appointment of the qualified persons under paragraph one shall be in accordance with the rules and procedure prescribed in the Ministerial Regulation.

Section 7. A qualified person appointed as member must not be a political official, holder of a political position, executive member or holder of a position with the responsibility in the administration of a political party.

Section 8. The Commission shall have the powers and duties as follows:

(1) to make recommendations to the Minister with regard to the issuance of Ministerial Regulation under this Act;

(2) to issue Notifications prescribing market share and sales volume of any business by reference to which a business operator is deemed to have market domination;

(3) to consider complaints under section 18 (5);

(4) to prescribe rules concerning, the collection and the taking of goods as samples for the purposes of examination or analysis under section 19 (3);

(5) to issue Notifications prescribing the market share, sales volume, amount of capital, number of shares, or amount of assets under section 26 paragraph two;

(6) to give orders under section 30 and section 31 for the suspension, cessation, correction or variation of activities by business operators;

(7) to issue Notifications prescribing the form, rules, procedure and conditions for the application for permission to merge businesses or initiate the joint reduction or restriction of competition under section 35;

(8) to consider an application for permission to merge businesses or initiate the joint reduction or restriction of competition submitted under section 35;

(9) to invite any particular person to give facts, explanations, advice or opinions;

(10) to monitor and accelerate an inquiry sub-committee's conduct of an inquiry of offences under this Act.

(11) to prescribe rules for the performance of work of the competent officials for the purpose of the execution of this Act;

(12) to perform other acts provided by the law to be the powers and duties of the Commission;

(13) to consider taking criminal proceedings as requested in the complaint lodged by the injured person under section 55.

Section 9. The qualified member under section 6 shall hold office for a term of two years.

At the expiration of the term under paragraph one, if a new qualified member is not yet appointed, the qualified member who vacates office at the expiration of the term shall continue to hold office for the purpose of the performance of work until a newly appointed qualified member takes office.

The qualified member who vacates office at the expiration of the term may be re-appointed but may not serve for more than two consecutive terms.

Section 10. The provisions of section 75, section 76, section 77, section 78, section 79, section 80, section 81, section 82 and 83 of the Administrative Procedure Act, B.E. 2539 (1996) shall apply to the appointment of a qualified member, the vacation of office of a qualified member and a meeting of qualified members *mutatis mutandis*, and a qualified member shall also vacate office upon being under the prohibitions under section 7.

Section 11. The Commission may appoint a sub-committee to consider and make recommendations on any matter or perform any act as entrusted and prepare a report thereon for submission to the Commission.

Section 12. The Commission shall appoint one or more specialised sub-committees consisting of, for each sub-committee, not less than four and not more than six persons qualified in the matter concerned and having knowledge and experience in various fields such as law, science, engineering, pharmacology, agriculture, economics, commerce, accountancy, or business administration as members, with the representative of the Department of Internal Trade as a member and secretary.

The specialised sub-committee shall elect one member as Chairman.

Section 13. The specialised sub-committee has the duty to consider and give opinions to the Commission on the following matters, as entrusted by the Commission:

(1) the matter concerning the conduct indicative of market domination, a merger of businesses, the reduction or restriction of competition under section 25, section 26, section 27, section 28 and section 29;

(2) the consideration of an application for permission to merge businesses or initiate the reduction or restriction of competition under section 37;

(3) other matters to be considered at the request of the Commission and other acts to be performed as entrusted by the Commission.

For the purpose of this Act, a specialised sub-committee may submit opinions or recommendations to the Commission with regard to the execution of this Act.

In carrying out the acts under paragraph one, the specialised sub- committee shall have the power to issue a written summons requiring the persons concerned to give statements or furnish documents or any other evidence for supplementing its consideration.

Section 14. The Commission shall appoint one or more inquiry sub-committees consisting of, for each sub-committee, one person possessing knowledge and experience in criminal cases who is appointed from police officials, public prosecutors and, in addition, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, as members, with the representative of the Department of Internal Trade as a member and secretary.

The inquiry sub-committee shall have the power and duty to conduct an investigation and inquiry in connection with the commission of offences under this Act and, upon completion thereof, submit opinions to the Commission for further consideration.

The inquiry sub-committee shall elect one member as Chairman.

Section 15. In the performance of the duties under this Act, a member of the Commission and a member of an inquiry sub-committee under section 14 shall have the same powers and duties as an inquiry official under the Criminal Procedure Code.

Section 16. In the case where the Commission submits to the public prosecutor the opinion for prosecution, an objection to the public prosecutor's non-prosecution order under the Criminal Procedure Code shall be the power to be exercised by the Chairman of the Commission in place of the Commissioner-General of the Royal Thai Police Force or the *Changwad* Governor as the case may be.

Section 17. The provisions of section 9 and section 10 shall apply *mutatis mutandis* to the sub-committee, specialised sub-committee and inquiry sub-committee.

CHAPTER II
Office of the Competition Commission

Section 18. There shall be established the Office of the Competition Commission in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department of Internal Trade as the Secretary-General, who shall be the superior official responsible for the official affairs of the Office, with the powers and duties as follows:

(1) to carry out administrative tasks of the Commission, the Appellate Committee and sub-committees appointed by the Commission;

(2) to prescribe regulations for the purpose of the work performance of the Office of the Competition Commission;

(3) to monitor the movement and oversee the conduct of business operators and report the same to the Commission;

(4) to conduct studies, analyses and research in relation to goods, services, and business conduct and make recommendations and give opinions to the Commission on the prevention of market domination, merger of businesses and reduction and restriction of competition in the operation of businesses;

(5) to receive complaints by which it is alleged by any person that violation of this Act has occurred and to carry out its preliminary consideration for submission to the Commission, in accordance with the regulations prescribed and published in the Government Gazette by the Commission;

(6) to co-ordinate with Government agencies or agencies concerned, for the purpose of the performance of duties under this Act;

(7) to perform the acts in, the implementation of Notifications, regulations and resolutions of the Commission and perform such acts as entrusted by the Commission, the Appellate Committee or the sub-committee appointed by the Commission

Section 19. In the execution of this Act, the competent official shall have the following powers;

(1) to issue a written summons requiring any person to give statements, facts or written explanations or furnish accounts, records, documents or any evidence for examination or supplementing his consideration,

(2) to enter the place of business, place of production, place of distribution, place of purchase, warehouse or place of service of the business operator or of any person or other place reasonably suspected to have therein a violation of the provisions of this Act, for the purpose of examining the conformity with this Act or for searching and seizing evidence or property which may be confiscated under this Act or arresting the offender under this Act without a warrant of search in the following cases:

(a) where a flagrant offence is evidently being committed in the place;

(b) where a person having committed a flagrant offence has, while being pursued, taken refuge, or there are serious grounds for suspecting that such person is concealing, in the place;

(c) where there are reasonable grounds for suspecting that the evidence or property which may be confiscated under this Act is found in the place and there are reasonable grounds to believe that by reason of delay in obtaining a warrant of search the evidence or property is likely to be removed, concealed, destroyed or transformed from its original state;

(d) where the person to be arrested is the owner of the place and there is a warrant for such arrest or such arrest may be made without a warrant;

Provided that, for these purposes, the competent official has the power to inquire into facts or summon accounts, records, documents or other evidence from the business operator or from the person concerned or order such persons who are in such place to perform necessary acts;

(3) to collect or take goods, in a reasonable quantity, as samples for an examination or analysis without payment of the prices of such goods, in accordance with the rules prescribed by the Commission in the Government Gazette;

(4) to attach documents, accounts, records or evidence for the purpose of examination and taking legal proceedings under this Act.

Section 20. In the performance of duties of the competent official, a person concerned shall render reasonable assistance.

Section 21. In the performance of duties, the competent official shall produce an identification card to the persons concerned.

The identification card shall be in accordance with the form prescribed by the Minister in the Government Gazette.

Section 22. The competent official shall procure service of the written summons under section 13 paragraph 3, section 19 (1) or section 44 (3) by directing it at the domicile or the place of business of the person named in the summons between sunrise and sunset or during working hours of such person or may send it by registered post requiring acknowledgement of receipt thereof.

In the case where the competent official serves the summons under paragraph one but the person named in the summons refuses to accept it without reasonable cause, the competent official shall request the administrative or police official to accompany the competent official for the purpose of leaving the summon on the spot. If the competent official does not meet the person named in the summons at his or her domicile or place of business, the summons may be served on any *sui juris* person who is living or working in that dwelling-place or place of

business. If nobody is met or nobody agrees to accept the summons on behalf of the person named therein, such summons shall be posted in a conspicuous place at the domicile or the place of business in the presence of the administrative or police official who accompanies as witness.

When the competent official has carried out the act under paragraph one or paragraph two, it shall be deemed that the person named in the summons has received it. In the case of the posting of the summons, it shall be deemed that such summons is received upon the lapse of five days as from the date of its posting. If the service is made by a registered post requiring acknowledgement of its receipt, it shall be deemed that the summons is received upon the lapse of five days as from the date of its receipt.

Section 23. In the execution of this Act, members, members of the Appellate Committee or of the sub-committee, Secretary-General, and competent officials shall be the officials under the Penal Code.

Section 24. For the purpose of arresting offenders under this Act, the competent official shall have the same powers as the administrative or police officer under the Criminal Procedure Code.

An arrest of the offender may be made without a warrant of arrest when a flagrant offence is evidently being committed or when there is any other circumstance under which the Criminal Procedure Code permits administrative or police official to make an arrest without a warrant of arrest.

CHAPTER III
Anti-Monopoly

Section 25. A business operator having market domination shall not act in any of the following manners:

(1) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;

(2) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;

(3) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;

(4) intervening in the operation of business of other persons without justifiable reasons.

Section 26. A business operator shall not carry out a business merger which may result in monopoly or unfair competition as prescribed and published in the Government Gazette by the Commission unless the Commission's permission is obtained.

The publication by the Commission under paragraph one shall specify the minimum amount or number of market share, sale volume, capital, shares or assets in respect of which the merger of business is governed thereby.

The merger of business under paragraph one shall include:

(1) a merger made by a producer with another producer, by a distributor with another distributor, by a producer with a distributor, or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business;

(2) a purchase of the whole or part of assets of another business with a view to controlling business administration policies, administration and management;

(3) a purchase of the whole or part of shares of another business with a view to controlling business administration policies, administration and management.

The application by a business operator for the permission under paragraph one shall be submitted to the Commission under section 35.

Section 27. Any business operator shall not enter into an agreement with another business operator to do any act amounting to monopoly, reduction of competition or restriction of competition in the market of any particular goods or any particular service in any of the following manners:

(1) fixing selling prices of goods or services as a single price or as agreed or restricting the sale volume of goods or services;

(2) fixing buying prices of goods or services as a single price or as agreed or restricting the purchase volume of goods or services;

(3) entering into an agreement with a view to having market domination or market control;

(4) fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for the goods or services or in order to prevent one party from participating in a bid or a tender for the goods or services;

(5) fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services to the exclusion of other business operators from competing in the distribution of such goods or services;

(6) fixing geographical areas in which each business operator may purchase goods or services or fixing persons from whom business operators may purchase goods or services;

(7) fixing the quantity of goods or services in which each business operator may produce, distribute, or provide with a view to restricting the quantity to be lower than the market demand;

(8) reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, whether the distribution is made at the same or at a higher price;

(9) appointing or entrusting any person as a sole distributor or provider of the same goods or services or the same kind of goods or services;

(10) fixing conditions or practice with regard to the purchase or distribution of goods or the provision of services in order to achieve the uniform or agreed practice.

In the case where it is commercially necessary that the acts under (5), (6), (7), (8), (9) or (10) be undertaken within a particular period of time, the business operator shall submit an application for permission to the Commission under section 35.

Section 28. A business operator who has business relation with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.

Section 29. A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.

Section 30. The Commission shall have the power to issue a written order requiring a business operator who has market domination, with the market share of more than seventy five percent, to suspend, cease or vary the market share. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.

Section 31. In the case where the Commission considers that a business operator violates section 25, section 26, section 27, section 28 or section 29, the Commission shall have the power to issue a written order requiring the business operator to suspend, cease, rectify or vary such act. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith.

The business operator who receives the order under paragraph one and disagrees therewith shall have the right to appeal under section 46.

The business operator may not claim compensation from the Commission by reason that the Commission has issued the order under paragraph one.

Section 32. In the consideration of the case under section 31, the Commission must afford the business operator, members of the specialised sub- committee, members of the inquiry sub-committee or competent officials concerned reasonable opportunities to give explanations and present supporting evidence.

In issuing an order under section 31, the Commission must specify reasons for such order both in questions of fact and in questions of law, and signatures of the members considering the case shall be entered.

The notification of the order under paragraph two shall be carried out within seven days as from the date of the Commission's order, and section 22 shall apply *mutatis nutandis*.

Section 33. The person receiving the order under section 31 must comply with such order unless the Court or the Appellate Committee passes a judgment or issues an order suspending the execution thereof or revoking the order of the Commission.

Section 34. In the case where the Court passes a judgment that any business operator is guilty of an offence under section 25, section 26, section 27, section 28 or section 29, the Court shall issue an order requiring the business operator to suspend, cease, rectify or vary such act.

CHAPTER IV
Application for Permission and Consideration of the Application

Section 35. Any business operator wishing to apply for permission to carry out the act under section 26 or section 27 (5), (6), (7), (8), (9) or (10) shall submit an application in accordance with the form, rules, procedure and conditions prescribed and published in the Government Gazette by the Commission.

The application must at least:

(1) contain adequate reasons and specify necessity for the act;

(2) specify the intended procedures therefore;

(3) specify the duration therefore.

Section 36. The Commission shall complete the consideration of the application under section 35 within ninety days as from the date of its receipt; provided that the business operator, members of the specialised sub-committee or competent officials concerned must be afforded reasonable opportunities to give explanations and present supporting evidence.

In the case where the consideration cannot be completed within the time specified in paragraph one by reason of necessity, the Commission may grant an extension of time for not more than fifteen days, but the reasons and necessity for the extension shall also be recorded in the consideration and decision proceedings.

Section 37. When the Commission has made an inquiry and is of the opinion that the application under section 35 submitted by the business operator is reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on material and due interests of general consumers, the Commission shall issue a written order granting permission in favour of such business operator. But if the Commission issues an order rejecting permission, the order shall be notified in writing to the business operator without delay.

In granting permission under paragraph one, the Commission may fix the time or any condition for compliance by the business operator to whom permission is granted, and, if it is of the opinion that economic situations, facts or conduct relied on by the Commission in its consideration have changed, the Commission may amend, make addition to, or revoke such time or conditions at any time.

The business operator who receives the order of the Commission and disagrees with such order shall have the right to appeal under section 46.

Section 38. The Commission must specify reasons for the order granting or rejecting permission under section 37 both in questions of fact and in questions of law and the order shall contain signatures of the members considering the application, and the provisions of section 32 paragraph three shall apply *mutatis mutandis*.

Section 39. The business operator to whom permission is granted under section 37 must carry out the business within the scope, duration and conditions permitted by the Commission.

In the case where there is a violation of or failure to comply with paragraph one, the Commission shall have power to revoke the permission order under section 37 in whole or in part and may also fix the time within which compliance is required.

CHAPTER V
Initiation of an Action for Compensation

Section 40. The person suffering an injury in consequence of the violation of section 25, section 26, section 27, section 28 or section 29 may initiate an action for claiming compensation from the violator.

In initiating an action for claiming compensation under paragraph one, the Consumer Protection Commission or an association under the law on consumer protection has the power to initiate an action for claiming compensation on behalf of consumers or members of the association, as the case may be.

Section 41. If the action for claiming compensation under section 40 is not submitted to the Court within one year as from the date the person suffering the injury has or ought to have had the knowledge of the ground thereof, the right to submit the action to the Court shall lapse.

CHAPTER VI
The Appeal

Section 42. There shall be an Appellate Committee consisting of not more than seven qualified persons with knowledge and experience in law, economics, business administration or public administration appointed by the Council of Ministers as members.

The members of the Appellate Committee shall elect one member among themselves as Chairman.

The Director-General of the Department of Internal Trade shall appoint Government officials of the Department of Internal Trade to act as secretary and assistant secretaries.

Section 43. The person appointed as member of the Appellate Committee must not be under the prohibitions under section 7 and shall not be a member of the Commission.

Section 44. The Appellate Committee shall have the following powers and duties:

(1) to prescribe the rules and procedure for the appeal under section 47 paragraph one;

(2) to consider and decide on the appeal against an order of the Commission under section 31 or section 37;

(3) to issue a written summons requiring the persons concerned to give statements or furnish documents or evidence for the purpose of the consideration of the appeal;

(4) to issue an order suspending the execution of the order of the Commission under section 31 or section 37.

Section 45. A member of the Appellate Committee shall hold office for a term of four years.

In the initial period, at the expiration of two years, three members of the Appellate Committee shall vacate office by drawing lots and such vacation of office by drawing lots shall be deemed to be the vacation of office at the expiration of the term.

The provisions of section 9 paragraph three and section 10 shall apply to the Appellate Committee *mutatis mutandis*.

Section 46. The appeal against the order of the Commission under section 31 and section 37 shall be submitted to the Appellate Committee by the person receiving the order within thirty days as from the date of the knowledge of the Commission's order.

Section 47. The rules and procedure for the appeal shall be as prescribed and published in the Government Gazette by the Appellate Committee.

The Appellate Committee shall consider and decide on the appeal within ninety days as from the date of the receipt thereof and notify the decision in writing to the appellant, and the provisions of section 36 and section 38 shall apply *mutatis mutandis*.

The decision of the Appellate Committee shall be final.

When the Appellate Committee has decided upon the appeal, the Commission and business operators shall comply with such decision.

CHAPTER VII
Penalties

Section 48. Any person who fails to comply with the written summons issued by the specialised sub-committee, competent official or the Appellate Committee under section 13 paragraph three, section 19 (1) or section 44 (3), as the case may be, shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding five thousand Baht or to both.

Section 49. Any person who obstructs the performance of duties by the competent official under section 19 (2), (3) or (4) or section 22 shall be liable to imprisonment for a term not exceeding one year or to a fine not exceeding twenty thousand Baht or to both.

Section 50. Any person who fails to render assistance to the competent official under section 20 shall be liable to imprisonment for a term not exceeding one month or to a fine not exceeding two thousand Baht or to both.

Section 51. Any person who violates section 25, section 26, section 27, section 28 or section 29 or fails to comply with section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.

Section 52. Any person who fails to comply with the order of the Commission under section 30 or section 31 or with the decision of the Appellate Committee under section 47 shall be liable to imprisonment for a term of one to three years or to a fine of two to six million Baht, and to a daily fine not exceeding fifty thousand Baht throughout the occurrence of such violation.

Section 53. Any person who discloses information concerning the business or the operation of a business operator which, according to the ordinary course of dealing of the business operator, is the restrictive and confidential information and which such person has acquired or knew on account of the performance under this Act shall be liable to imprisonment for a term not exceeding one year, or to a fine not exceeding one hundred thousand Baht or to

both, unless it is the disclosure in the performance of Government service or for the purpose of an inquiry or trial.

Any person who acquires or has the knowledge of any fact from the person under paragraph one and discloses such information in the manner likely to cause an injury to any person shall be liable to the same penalty.

Section 54. In the case where the person who commits an offence punishable under this Act is a juristic person, then, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or he or she has already taken reasonable action for preventing the commission of such offence from occurring

Section 55. The injured person in the offences under section 51 and section 54 may not institute a criminal action on his or her own motion but has the right to loge a complaint with the Commission for consideration under this Act.

Section 56. All offences under this Act which are punishable by fine or imprisonment for a term not exceeding one year shall be under the power of the Commission to settle the cases. In exercising such power, the Commission may entrust a sub-committee, the Secretary-General or a competent official to act on its behalf.

When the offender has paid the fine in the fixed amount within the specified time, the case shall be deemed settled in accordance with the provisions of the Criminal Procedure Code.

Transitory Provision

Section 57. In the case where a business operator is under necessity and has carried out the acts specified in section 27 (5), (6), (7), (8), (9) or (10) on the day this Act comes into force, such person shall submit an application within ninety days as from the date of the entry into force of this Act, and when the application has been submitted, such business operator may continue to carry out the acts under section 27 (5), (6), (7), (8), (9) or (10) until the notification of the result of the consideration of the application is received

Countersigned by: Chuan Leekpai

Prime Minister

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RECENT IMPORTANT COMPETITION CASES IN DEVELOPING COUNTRIES

Report by the UNCTAD secretariat

Executive summary

This report reviews recent important competition cases involving anti-competitive practices or mergers in developing countries, including cases involving other countries or foreign firms. It appears from these cases that competition law enforcement in some developing countries is becoming stronger, as is cooperation between competition authorities from some developed and developing countries or regions. However, some of these cases also suggest that further national efforts and more advanced international cooperation would be required for developing countries to take effective action against RBPs affecting their trade and development.

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INTRODUCTION AND OVERVIEW

1. The present report is the third in a series of reports reviewing cases previously prepared by the UNCTAD secretariat, including a 1995 report on "Restrictive business practices that have an effect in more than one country, in particular, developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6) and a 1998 report "Competition cases involving more than one country" (TD/B/COM.2/CLP/9). This third report has been prepared in line with paragraphs 9 and 12 of the resolution adopted by the Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[1] Paragraph 9 requests the Secretary-General of UNCTAD to "take stock of anticompetitive cases with effects in more than one country, and the problems encountered in investigating the cases, to study the degree of efficiency of cooperation between competition authorities and Governments in solving them," while paragraph 12 requests the secretariat to continue to publish certain documents on a regular basis and to make them available on the Internet, including "an information note on recent important competition cases, with special reference to competition cases involving more than one country, and taking into account information to be received from member States".

2. Most of the cases reviewed in this report have been selected from material provided by some member States in response to a request for information sent out by the UNCTAD secretariat;[2] recourse has been had as well to other available material. Twelve cases have been reviewed, which arose in the following countries: Brazil, Kenya, Romania, South Africa, Zambia, Zimbabwe and Venezuela. Thus, unlike the above-mentioned first two reports in this series, the present report does not include cases which occurred in developed countries. Taking into account the above-mentioned terms of the mandate, and the relatively few cases involving developing countries regarding which it was possible to obtain information, a broad range of cases was selected for review, including those : (a) having effects upon the markets of more than one country, including a developing country; (b) involving enterprises not domiciled in the developing country where the case has been considered; or (c) involving issues or sectors of relevance or importance internationally, particularly for developing countries. Cases on which no final decision on the substance has as yet been taken by the relevant competition authority, or cases which appear to have solely national significance, have not been included.

3. This report has been divided into two sections, dealing respectively with six cases involving anti-competitive practices (such as cartels or abuses of a dominant position) and six cases of merger control. Within the first section, three of the cases (which are dealt with first) relate to horizontal practices, and the other three relate to abuses of dominance and/or vertical restraints. The facts of each case are briefly presented, the action taken by the competition authority concerned is described, and a commentary on the case is then made, discussing and analysing the issues raised and suggesting some implications, including (where appropriate) for international cooperation in this area.

4. The cases reviewed in the present paper show that, in a context of globalization and liberalization, competition law and polices are becoming a key element in some developing

countries' economic policies. However, the relatively small pool of cases and countries (mainly some African and Latin American countries) from which these samples were drawn suggests that more efforts need to be made by more countries to adopt and effectively enforce competition laws and to undertake pedagogical efforts in order to strengthen a competition culture in their markets. This point is reinforced by the fact that there was a disproportionate number of mergers in the pool of cases in developing countries from which the cases reviewed here were drawn. While this may be ascribed to the fact that mergers may be subject to pre-notification or are more likely to be publicly known, that there are usually deadlines to deal with them and that the parties concerned tend to be cooperative in providing information; this disproportionate focus on mergers would still emphasize the need to enhance the powers and resources of competition authorities in developing countries so as to enable them to detect and take action against more anti-competitive practices. Some of the cases reviewed demonstrate how cartels or mergers originating from abroad of developing countries, and how these have been successfully dealt with by the competition authorities concerned. However, by its very nature, the present report tends to deal with the success stories in this respect, and questions might be raised as to the extent to which, and the means by which, most developing countries would be able to control such cartels or mergers.

5. In any event, any national efforts by developing countries to control RBPs or mergers originating from overseas would need to be complemented by international cooperation. There are some examples among the cases reviewed of successful international cooperation in this area, which appears to have been of critical help in resolving these cases. However, again, questions might be raised as to how far the relatively limited nature of the cooperation that was involved in most of these cases might have been useful, or even available, to assist in detecting or obtaining information about many of the RBPs or mergers originating from overseas affecting developing countries, or to enforce orders relating to such RBPs or mergers. It is recalled in this connection that the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices provides that States should: seek appropriate remedial or preventive measures to prevent and/or control RBPs within their competence when it comes to their attention that such practices adversely affect international trade and development (para. E.4); institute or improve procedures for obtaining information from enterprises, including transnational corporations, necessary for their effective control of RBPs (para. E.6); establish appropriate mechanisms at the regional and subregional levels to promote exchanges of information on RBPs and on the application of national laws and policies in this area, and to assist each other to their mutual advantage regarding control of RBPs at the regional and subregional levels (para. E.7); and, on request, or at their own initiative when the need comes to their attention, supply to other States, particularly developing countries, publicly available information and, to the extent consistent with their and laws and established public policy, other information necessary for the effective control of RBPs (para. E.9).

I. ANTI-COMPETITIVE PRACTICES

1. Brazil

International vitamins cartel
Roche, BASF and Aventis

Facts

6. In 1999, the Brazilian competition authorities initiated proceedings against the Brazilian subsidiaries of three chemical or pharmaceutical firms (Roche, BASF and Aventis Animal Nutrition, the latter formed through the merger of Rhône-Poulenc and Hoescht) for conspiracy to fix the prices and allocate market shares of bulk vitamins in Brazil as an extension of their participation in an international vitamins cartel which was prosecuted in the United States. In May 1999, the Swiss firm Roche and the German firm BASF agreed to plead guilty in the United States to participation in a worldwide conspiracy to fix prices and allocate market shares of vitamins from 1990 to 1999. The French firm Rhône-Poulenc, which also took part in the same conspiracy, was not charged in the United States because of its cooperation with the investigation by the United States Department of Justice, in line with the Department's corporate leniency policy.

Action

7. The Brazilian authorities carried out extensive investigations that lasted about a year. In the course of these investigations, the Brazilian authorities searched the premises of the Latin American headquarters of Roche and BASF and requested copies of several documents. They also interviewed several of the main executives in the vitamin industry in Latin America. The Brazilian authorities were also assisted by general information received from the United States Department of Justice. The result of these investigations provided strong evidence that, in line with instructions from their global headquarters, the Brazilian subsidiaries of Roche, BASF and Rhône-Poulenc had made co-ordinated efforts to avoid price reductions and to limit the supply of the vitamins A, E and beta-carotene in Brazil and in the rest of the Latin American market and that, for this purpose, their executives responsible for the Latin American vitamin market had held quarterly meetings between 1995 and 1998 to exchange prices and sales information. Appeals against this decision are still proceeding, and no information is as yet available regarding the sanctions that would be levied for these infringements of the competition law.

Commentary

8. Vitamins A, E and beta-carotene are important inputs for the production of foods, medicine, cosmetics and animal feed. The annual turnover of these products in Brazil is estimated to be around US$ 55 million. As the conspiracy affected the Brazilian economy from 1990 to 1999, the total turnover of this market during this period would be over half a billion dollars. Thus, the behaviour of these firms affected all Brazilian citizens, who were prevented from benefiting from the price reductions that would have resulted from a

competitive environment. The Brazilian investigation had positive effects not only for national consumers, but also probably for consumers in the rest of South America. While Brazil was the first country outside North America to bring proceedings against the conspirators who had taken part in the international cartel of vitamins, there is no information available regarding any proceedings brought against the international vitamins cartel by any developing country other than Brazil, even though news of the proceedings in the United States was widely reported. But the fact that the firms concerned had their headquarters for Latin America in Brazil would have enabled the Brazilian authorities to take action which many other developing countries would not have been in a position to take.

9. This case also underlines the importance of strengthening international cooperation through exchange between competition authorities of information relevant to investigations of international cartels. In this connection, it is noteworthy that the immunity from prosecution acquired by Rhône-Poulenc in the United States because of its cooperation with the Justice Department did not prevent the Department from providing enough general information to the Brazilian Competition Commission to facilitate action against Rhône-Poulenc in respect of that part of the international cartel which concerned the Brazilian market. However, taking into account that the instructions to cartelize the Brazilian and Latin American markets were given to the Brazilian subsidiaries from the global headquarters of the firms concerned, it is open to question whether the Brazilian Competition Commission would have become aware of the existence of the international cartel had the cartel not first been prosecuted by one of the United States federal competition agencies for cartelization of the United States market. There is also no indication that there were any consultations between the Brazilian competition authorities and the authorities of any other Latin American country affected by the cartel. Thus, if an international cartel targets only markets of developing countries and/or countries with limited international enforcement capabilities, there is a risk that the cartel may go undetected and unpunished, since competition authorities do not normally take action against practices originating from their territories which have effects upon markets of other countries.

2. Brazil

Steel Cartel:
SDE x Cia. Siderúrgica Nacional – CSN, Cia. Siderurgica Paulista – Cosipa and Usinas Siderurgicas de Minas Gerais – Usiminas

Facts

10. The Brazilian competition authorities initiated an investigation of a cartel formed among three steel manufacturers (CSN, Cosipa and Usiminas) aimed at fixing the sale prices of common flat steel. The authorities had been informed that these firms would agree to fix new prices for their steel at a meeting called on 30 July 1996 by representatives of the industry association Instituto brasileiro de metalurgia (IBS), Cosipa, Usiminas and CSN, with effect from 1 August 1996.

Action

11. On 31 July 1996, the Brazilian authorities warned the firms concerned that the proposed conduct might be considered an infringement of the economic order, within the terms of Brazilian competition law. On 1 August 1996, CSN set new prices for its flat steel. On 5 and 8 August 1996 respectively, Cosipa and Usiminas also set new prices for their flat steel. These decisions to readjust prices had been communicated by letter beforehand to these firms' clients. On 11 June 1997, the Brazilian authorities concluded that this setting of sale prices for common flat steel amounted to a cartel. However, throughout the proceedings, Usiminas and Cosipa systematically denied taking part in the meeting of 30 July 1996. IBS was asked to provide information regarding which firms were present at this meeting, and it confirmed these two firms' participation, naming the employees present. When these two firms were asked to comment on this information, they confirmed the presence of their employees at the meeting, but insisted the employees were present in an unofficial capacity as guests of IBS and with no power to undertake any negotiations. The firms further contended in their defence that the readjustment of their prices resulted from a traditional process of price leadership.

12. The technical opinion prepared for the competition authority found that the characteristics of the Brazilian industry for common flat steel indicated a scheme of collusive price leadership, since it was an oligopoly making homogeneous products, with high market concentration, strong entry barriers, similar costs and inelastic demand. Moreover, there had never been a readjustment of prices which had not been immediately carried out by the whole group of manufacturers. The possibility of a change in market leadership, under very restrictive conditions, which existed in an oligopoly with barometric price leadership could not be expected in an oligopoly with collusive price leadership; changes in price leadership could only occur if there was certainty that the other competitors would be prepared to keep up with the readjustments. The technical opinion worked under the hypothesis that if there were any other economic explanation for the parallelism of conduct other than the practice of cartelization, an infringement of economic order could not be considered to have taken place; however, it concluded that the economic rationality of the price readjustment by the industry in 1996 had not been demonstrated.

13. The Brazilian competition accordingly concluded that the meeting held by the firms in the sector, through their industry association, and the parallel pricing behaviour which had not been satisfactorily explained, amounted to proof of collusion and was an infraction of the economic order. It ordered that:

(a) Each of the firms concerned should pay fines of 10 per cent of the value of their gross turnover before the proceedings (not including taxes), resulting in payment of R$ 22,180,000 by CSN, R$ 16,180,000 by Usiminas and R$ 13,150,000 by Cosipa;

(b) Fines of R$ 3,512,315 by Usiminas and R$ 3,487,890 by Cosipa respectively should be paid for their misleading conduct in trying to deceive the competition authority about the 30 July meeting;

(c) An abstract of the authority's decision should be prominently published, at the expense of the firms concerned, in the largest newspaper of the Brazilian state in which each firm was established;

(d) An official notice should be sent to SDE regarding the initiation of an investigation of the unwillingness of Mallory S.A. which was questioned throughout the proceedings, to provide information.

Commentary

14. Given the size of the firms involved and the fines levied, as well as the importance of the steel sector, this price-fixing cartel case was clearly of importance in the Brazilian context. This case would also be of interest to other developing countries producing steel; several segments of the steel sector are sensitive to economies of scale so there would be room for only a relatively limited number of producers in these market segments and, as this case shows, cartels are easily formed when there are a limited number of players in the market. The case is further of interest in demonstrating the use of an industry association to set up a price-fixing arrangement, in the excuses used by two of the firms concerned to cover up the formation of the cartel, in the use made by the Brazilian competition authority of an expert opinion on the economics of the industry to demonstrate that cartelization could be the only explanation for the behaviour of the firms concerned, and in the levying of fines for misleading conduct.

3. South Africa

Code sharing agreement in the international air industry
South African Airways (SAA) vs. Quantas

Facts

15. In November 2000, South African Airways (SAA) submitted to the South African Competition Commission an application for an exemption for its code-share agreement with Quantas. The code-share agreement would be effective in January 2001. The case was analysed with regard to Section 10 of South African Competition Act, the relevant subsection of which states that:

"(1) A firm may apply to the Competition Commission to exempt an agreement, or practices, or category of either agreements, or practices, from the application of this Chapter ...

(3) The Competition Commission may grant an exemption in terms of subsection ...

(b) the agreement, or practice, or category of either agreements, or practices, concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports; ...

(iii) change in productive capacity necessary to stop decline in an industry; ..."

Action

16. Given the specificities of the regulation of the international airline industry, the South African Competition Commission conducted its investigations in two stages. In the first stage, the Commission's investigators held discussions with the representatives of South African Airways to make a preliminary review. During the course of the review, it became apparent that more clarification was required in order to fully appreciate the implications of the code-share agreement. The Commission accordingly requested additional information from the airline.

17. In the second stage, the South African Competition Commission contacted the Australian Competition and Consumer Commission (ACCC) to find out if they had reviewed the transaction. Furthermore, the South African Commission consulted with the International Air Services Commission (IASC), which advised that it had approved the code-share agreement for a year, subject to certain conditions. These conditions took into account the concerns that had been raised earlier by the ACCC.

18. Following this, the Commission, taking into consideration the situation in the South African airline industry, as well as other relevant issues, granted SAA and Quantas an exemption for the code-share agreement for the period from February 2001 to June 2002, on the grounds that the code-share agreement would result in increased exports of cargo; the operation of the exemption is monitored on the basis of quarterly compliance reports.

Commentary

19. This case is an illustration of how the procedures and criteria for granting exemptions work in practice and, specifically, how the promotion of exports may be taken into account. The treatment of code-sharing agreements in the airline industry by the Commission may have relevance for competition authorities in other developing countries. The case also illustrates the fact that cooperation and information exchange between competition authorities is possible even in the absence of a formal bilateral cooperation agreement between them, as well as cooperation between a competition authority and an international organization responsible for regulating a specific sector. However, the case also illustrates the limits of such informal cooperation. The conditions imposed by the South African Commission were tailored to take into account those imposed by the ACCC and the IASC. However, it might have been preferable if the South African Commission had been consulted before conditions on the code-sharing arrangement were imposed by these other two bodies, so that the South African Commission's views might have been taken into account and the conditions imposed by these bodies coordinated at an early stage.

4. South Africa

Resale price maintenance in the pharmaceutical industry
Nutri-Health

Facts

20. A South African Competition Commission staff member shopping for personal medication at a pharmacy noticed that a packet of slimming tablets, which had the Nutri-health label on, specified the minimum price for the tablets. This was contrary to the provisions of section 5(2) of the South African Competition Act, which states: "the practice of minimum resale price maintenance is prohibited".

Action

21. The investigations conducted by the Competition Commission found that it was not an isolated case. All the retailers of the product in question had complied with the minimum resale price condition. The manufacturers settled on a consent order with the Commission, which provided that they remove from their label those parts that were anticompetitive and/or misleading to the consumer.

Commentary

22. This case is a good illustration of the pedagogical efforts that need to be made to enforce competition laws in developing countries. It is significant that the infringement of the competition laws was only brought to the attention of the competition authority by one of its staff members, and not by a member of the general public. This demonstrates that, for competition enforcement to be efficient, there is a need to educate the general public and enterprises regarding the competition law, especially in countries where a competition culture is not well developed. The case may also be of interest to developing countries seeking to take action to benefit consumers of pharmaceuticals.

5. Venezuela

Abuse of dominant position in the telecommunications industry
Telefonica CANTV

Facts

23. Complaints were made to the Venezuelan competition authority that Compañia Anonima Nacional de Telefonos de Venezuela (CANTV), which had a monopoly position in the provision of basic telecommunications services, had imposed discriminatory commercial conditions upon other value added services Internet providers, as compared with the conditions granted to its own Internet provider subsidiary CANTV Servicios.

Action

24. The investigations undertaken by the authority found that CANTV's dominant position in the interconnection market made it possible to give particularly advantageous conditions to CANTV Servicios, and that it had in fact done so. CANTV was also found to have refused to give other Internet providers access to its local loop in Venezuelan towns (other than the capital Caracas) at the cost of a local telephone call. On 7 July 2000, the Venezuelan antitrust authority concluded that CANTV had abused its dominant position in a manner falling within the terms of article 13 of the Venezuelan Competition Law. It fined CANTV 1,875,904,275 bolivares, equivalent to 1.3 per cent of the other revenues of this firm in 1999. It also laid down the new conditions that CANTV would have to grant so as to reorganize the relevant market of Internet service providers (ISPs) - CANTV was instructed to offer similar commercial conditions to other Internet service providers, as well as available interconnection numbers enabling them to access local loops at the cost of a local telephone call.

Commentary

25. This case illustrates the role that competition authorities can play in the regulation of the telecommunications sector in general and the ISP segment in particular. Until recently, telecommunications services in most developing countries were in the hands of State-owned monopolies, which have now been privatized in many cases. The introduction of new services such as the Internet has provided an incentive to these firms to commit different forms of abuse, particularly as they usually continue to maintain their dominant positions in the basic telecommunications sector, especially in the local loop. It should be noted that the question of the dominant position of basic telecommunication providers and interconnection with local loops is not as yet resolved in several developed countries, and has created some controversy.

6. Zimbabwe

Predatory practices in beer brewing and distribution
Nesbitt Brewery vs. National Breweries Limited

Facts

26. Nesbitt Brewery (Pvt) Limited, a small brewing company located at Chiredzi, Zimbabwe, lodged a complaint with the Competition Commission that National Breweries Limited was engaged in predatory pricing, having drastically reduced the price of clear beer in Chiredzi to levels which were unprofitable, with the intention of driving Nesbitt Brewery out of the market. Investigations revealed that the clear beer industry in Zimbabwe was highly concentrated, with an HHI index in excess of 8,000. Nesbitt Brewery was a new entrant into the market, challenging the long-standing monopoly position of National Breweries, which held a market, share of 90 per cent. National Breweries has a national distribution network, while Nesbitt Brewery only operates in Chiredzi. Investigations further

revealed that the National Breweries had ran a beer promotion in Chiredzi from May 1999 to April 2000 when the Competition Commission started gathering information on the case. The promotion included free snacks and T-shirts, lucky draw tickets, free beers and substantial price reductions. The promotion was only held in Chiredzi, where Nesbitt Brewery is based and also sells the bulk of its beer. The National Breweries retail prices for its beer in Chiredzi during the promotion period were below its normal landed prices in that town.

Action

27. A full-scale investigation under section 28 of the Competition Act of 1996 was conducted by the Competition Commission. The alleged practices were found to be predatory within the terms of section 2 of the Act. Although National Breweries stopped their promotion activities as soon as they became aware that they were being investigated, the Competition Commission made them sign an undertaking that they would desist from future promotional activities primarily aimed at driving Nesbitt Brewery out of the market.

Commentary

28. Had there been no competition law in Zimbabwe at the time of this case, Nesbitt Brewery could easily have been driven out of the market by National Breweries in the exercise of its monopoly power. This case is particularly relevant to several African countries which have similar market structures in the beer sector, with new firms attempting to enter the market and challenge the position of incumbents. Also of interest is the procedure used. The Zimbabwean competition law allows for negotiations between the Competition Commission and affected parties to ensure the discontinuance of any restrictive practice, and the Commission used this provision to negotiate an undertaking with National Breweries to ensure that, in future, they would not engage in the practices complained of. Most competition laws provide for such administrative procedures for dealing with cases; only at a second stage, if firms refuse to adhere to agreed orders/prohibitions, would sanctions be applied in competition cases. Such procedures would be particularly useful where countries have adopted new competition laws, and the business community is not fully aware of the implications of certain actions in the market place.

II. MERGERS

7. Brazil

Merger in the carbonic gases and gases of air industry
White Martins and Unigases Commercial Ltda

Facts

29. The acquisition in the United States of the United States-based CBI Industries Inc. by Proxair Inc. brought about changes in the structure of the Brazilian carbonic gas and gases of air (oxygen, nitrogen and argon) market. White Martins, a subsidiary of Proxair Inc., took control of all operations performed in South America by Liquid Carbonic, a subsidiary of CBI Industries, through the Brazilian company Unicases Comercial Ltda's. The operation brought about a structural change in the southeast region of the country, with the elimination of competition between White Martins and Liquid Carbonic; White Martins became the sole supplier of carbonic gas in the region. The analysis of market entry conditions carried out by the Brazilian competition authority confirmed the existence of strong barriers against imports of the relevant product, as well as to access to the economically viable sources of raw material in the southeast, which were almost entirely owned by White Martins. By 1999 the incumbent's market share was 73.7 per cent of the total market.

Action

30. Having determined that the relevant market was the southeast region of the country, the Brazilian authority concluded that, even though the operation offered efficiency benefits, it gave White Martins substantial market power in the southeast region. As the lack of raw material was the reason for this market power held by the acquirer, becoming a strong barrier to entry, the Brazilian authorities conditioned the approval of the operation on a series of requirements:

(a) The two firms should abstain, over the following six years, from any bidding process from any new source of carbonic gas subproducts which might arise in the southeast region;

(b) Products should be sold under normal prices to both competitors and distributors;

(c) The limits of the terms of the acquisition should be settled in the supply contracts;

(d) Any preferential conditions or exclusivity in gas supply contracts for clients of the company should be eliminated;

(e) Clients' total freedom to choose FOB (free on board) or CIF (cost including freight) conditions when buying the company's products should be guaranteed;

(f) An annual report should be submitted to the Authority providing information about the evolution of the carbonic gas market.

Commentary

31. This case is important because it shows how a merger operation in a developed country can have effects upon a developing country's economy, and indeed lead to dominant positions on the markets of that country or part of it. In such circumstances, competition authorities in developing countries should be prepared to take appropriate action in respect of such structural operations where these might allow anticompetitive practices at a later stage. In the present case, the Brazilian authorities allowed the operation to proceed subject to certain conditions that might stop the anticompetitive effects deriving from the creation of a dominant position. This does, however, raise the issue of what action might have been taken by the authority if it had determined that the only possible means of preventing anticompetitive effects was to block the merger – would it have been in a position to enforce any order it made prohibiting this international merger from going ahead?

8. Kenya

Merger in the soft drink industry
Take-over of coca cola plants by M/s Coca-Cola South Africa Bottling Company Pty (Coca-Cola SABCO)

Facts

32. Towards the end of September 1997, M/s Coca-Cola SABCO (the Kenyan subsidiary of Coca-Cola International), with the support of M/s Coca-Cola Africa (which had its headquarters in South Africa), submitted an application for the acquisition of M/s Flamingo Bottlers of Nakuru, which bottled Coca-Cola. Investigations revealed that M/s Coca-Cola SABCO had already acquired Nairobi Bottlers (the most important plant bottling Coca-Cola in the country) in 1995. That acquisition had been effected without the approval of the Minister for Finance, as provided under the Kenyan competition law. Coca-Cola had a dominant position in the market for branded carbonated soft drinks in Kenya, and the acquisition of SABCO (as well as the previous acquisition of Nairobi Bottlers) appeared to be part of a strategy for strengthening and sustaining its dominance in the market by taking direct control of production, marketing and supply of inputs in all the Kenyan plants bottling Coca-Cola.

Action

33. To deal with the application for the acquisition of Flamingo Bottlers, a large number of stakeholders in the soft drinks sector, including government agencies, consumers, traders, potential competitors, trade associations and the applicants, were interviewed by competition officials in October and November 1997. The Minister finally approved the application subject to certain conditions on 3 December 1997. One of the conditions laid down was that Coca-Cola would not take over any of the remaining bottling companies in Kenya.

Investigations into the structure, conduct and performance of Kenya's carbonated soft drinks sector have been and still are on going in response to appeals from Coca-Cola SABCO for the Commission to reconsider the conditionality imposed on the company in 1997. The last appeal was received in 2000 at a time when the Commission was investigating several complaints against the practices and conduct of M/s Coca-Cola SABCO, and it was rejected.

Commentary

34. The case above had initially involved a contravention of the competition law by SABCO because it had acquired one of the plants bottling Coca-Cola in Kenya without seeking approval from the Competition Authority. The Kenyan competition authority, while allowing the second acquisition to go ahead, decided that the plan of taking over all the other bottling companies and consolidating them into one entity to be run by SABCO would lead to both horizontal and vertical concentration of market power and the likely abuse of dominance, and accordingly stopped the process from going further. Thus, the Kenyan authority, dealing with a huge global company, applied the competition law to foreclose likely anticompetitive practices in the market. This is a step forward in efforts to uphold competition principles in developing countries. But this case also shows that many mergers may be taking place without the knowledge of competition authorities in developing countries.

9. Romania

Merger in the automobile industry
S.C. Automobile Dacia and Renault

Facts

35. In 1999, the Romanian Competition Council opened an investigation into the acquisition by Renault S.A., a French firm, from the State Ownership Fund (SOF) of the majority stockholding in S.C. Automobile Dacia S.A. Pitesti. To support the Dacia-Renault project, the Romanian Government was prepared to grant state aids. Renault S.A. is part of the Renault Group, which produces cars and industrial vehicles and undertakes financial activities. The motor cars branch of the Renault Group has plants in over 30 locations in France, Europe, Latin America, Africa and Asia. Renault is the first brand in terms of turnover in Western Europe in the private and utility motorcars market. Renault S.A. did not control, either directly or indirectly, any undertaking operating in Romania in the field of car manufacturing or marketing.

36. The main line of business of S.C. Automobile Dacia S.A. Pitesti is the manufacturing and marketing of cars, utility vehicles, vans, pick-up trucks and ambulances, for both the domestic market and exportation. However, the relevant product markets for the merger were smaller medium-class cars and utility motor vehicles, while the relevant geographic markets were Romania (for the following five years while Renault was completing its investment in Dacia) and, in the long term, Romania and the Central and Eastern European countries. Dacia held a dominant position in both product markets in Romania, but its future prospects were

poor because it was highly vertically integrated, with excessive personnel, old and poorly maintained equipment and facilities, low productivity, and poor-quality products failing to meet new Romanian product standards and for which there was declining demand and growing price competition.

Action

37. The Competition Council approved the acquisition, taking into account that in the long run, a normal structure of the two relevant markets would be achieved, there would be a significant improvement in the quality of Dacia motor cars with only a reasonable price increase, and there were long-term prospects for Dacia cars to be sold in the European Union and for its brand to become the second trade mark of the Renault group.

Commentary

38. This case is an illustration of how foreign direct investment can have effects on competition and efficiency within national and international markets. Both countries with economies in transition and developing countries are going through the process of privatizing State-owned monopolies. In this process, national competition authorities should ensure that private monopolies are not created, but they also have not to affect the economic benefits arising from the privatization. In this case, the Romanian Competition Council conducted a careful economic analysis which took into account all relevant factors before concluding that the merger was acceptable. The Council approved the acquisition after it had imposed certain condition to safeguard the level of competition in the automobile market in Romania.

10. South Africa

Economic concentration in the pharmaceutical industry
Glaxo Wellcome PLC and Smithkline Becham PLC

Facts

39. In January 2000, Glaxo Wellcome PLC and Smithkline Beecham PLC, two companies operating in the pharmaceutical industry in South Africa, made a pre-notification of their proposed merger to the Competition Commission. The Commission had to determine whether the merger would substantially prevent or lessen competition, as well as to consider certain public interest issues (including employment), in line with section 16 of the South African Competition Act.

Action

40. The Commission initially prohibited the transaction on public interest grounds, as well as on the basis that it substantially prevented or lessened competition in certain specific therapeutic categories. At this point, the Commission was aware that the European Commission also had problems in these categories and was in the process of agreeing upon certain undertakings with the parties. These were subsequently agreed upon and the EU

approved the merger. The Competition Commission also raised similar concerns with the parties in South Africa. In order to apply a consistent approach to these issues, the Commission consulted with relevant EU personnel, who provided useful insights on the issues. They also provided a copy of the agreement between the EU and the merging parties, with confidential information deleted.

41. The Competition Commission then had to consider public interest issues. The parties advised the Commission that only some of the employees at the middle management level would lose jobs as a result of the duplication of responsibilities occasioned by the merger. The Commission was satisfied with the explanation, as this loss in employment did not outweigh the competition considerations that the Commission had agreed upon with the parties. The final agreement provided for a divestiture (out-licensing) by the parties of products in some therapeutic categories where they would have market power. The divestiture related to products in respect of which the intellectual property rights had almost expired, i.e. generics would become soon available on these products. The Commission allowed the parties to retain the products over which the IPRs had not yet expired.

Commentary

42. This case is an example showing how, apart from competition criteria, public interest criteria such as employment may be taken into account in evaluating the impact of a merger. Furthermore, the case illustrates how the application of competition policy may take into account IPRs, resulting in orders for divestiture or licensing out of some IPRs which had almost expired, while no orders were made in respect of other IPRs which still had some time to run. This decision taken by the South African Competition Commission using information obtained from the European Commission illustrates the fact that close cooperation between competition authorities is feasible and can be successful in helping to resolve serious competition cases, despite the lack of a formal cooperation agreement between the competition authorities concerned, and despite the fact that it was not possible to exchange confidential information. However, this does raise the issue of whether the action taken by the South African Commission would have been as successful had they needed confidential information to undertake their deliberations, had the European Commission not considered the case in any depth because it did not raise competition problems in European markets, or had the Commission sought to mandate divestiture of IPRs which still had lengthy terms to run. There is also the issue of whether any other developing countries which may have been affected by the merger but which did not have local subsidiaries of the firms concerned established on their territory would have been able to take any action at all.

11. Zambia

Economic concentration in the dairy industry
Bonnita Zambia and Parmalat

Facts

43. The previously State-owned Dairy Produce Board had been privatized and sold to a South African company called Bonnita. Bonnita Zambia was established to revive the ailing Zambian dairy industry. The industry is of strategic importance to the rural economy where most dairy farmers come from. Bonnita South Africa had been taken over by Parmalat of Italy, and the acquisition also covered Bonnita South Africa's Zambian investments under Bonnita Zambia. The dairy farmers were at first apprehensive about the entry of Parmalat into the picture, as they were concerned about their own investments in Bonnita Zambia, as well as about the future of the support structure that Bonnita Zambia had so well developed in the supply and distribution of dairy products right from the farmers to the consumers.

Action

44. The Commission was concerned about the competitive effects that were likely to emerge if a new player was to come into the market and discontinue the developmental approach that had been taken by Bonnita. It evaluated the effects of the merger in accordance with the provisions of the competition Act, specifically section 8 (on Mergers and Take-overs Notification) read together with section 7 (on whether the object of the transaction is to prevent, restrict or distort competition in the relevant market). The Commission authorized the take-over but, taking into account the farmers' concerns, made it subject to Parmalat continuing the formal contacts established with dairy farmers throughout the country, as well as maintaining the shares that a dairy farmers' consortium had in the company. Parmalat's exclusive distribution arrangement was also authorized subject to removal of price fixing and territorial restraint clauses.

Commentary

45. This is a case, which was prompted by a take-over of Bonnita South Africa by Parmalat of Italy that had spillover effects upon the Zambian Bonnita subsidiary. Such cases are very common worldwide, and their effects on developing countries have been mixed. In this case, the Zambian Competition Commission took into account both the views of the dairy farmers and the competition effects of the take-over. Developing countries' competition authorities may need to take extra care when dealing with such spill-over mergers or take-overs, and may wish to ensure that they do not cause harm to local industries, while also upholding competition principles. In such circumstances, it would be important to have recourse to all relevant provisions in the competition laws to work out solutions which would help to resolve the concerns of all market participants.

12. Zimbabwe

Economic concentration in the tobacco industry
Rothmans of Pall Mall (Zimbabwe) Limited and British American Tobacco Zimbabwe Limited.

Facts

46. In this case, British American Tobacco Plc of the United Kingdom announced the conclusion of an agreement with the shareholders of Rothmans International, Compagnie Financiere Richemont AG of Switzerland and Rembrandt Group Limited of South Africa to merge their international tobacco business in January 1999. After the completion of the international merger between British American Tobacco Plc and Rothmans International, Rothmans of Pall Mall (Zimbabwe) Limited applied to the Zimbabwean Competition Commission for authorization to acquire the entire issued share capital of British American Tobacco (Zimbabwe) Limited. The merging parties also gave as one of the motivations the goal of merging the declining local market for cigarettes; the market was not enough to sustain two manufacturers, and evidence was presented as to the declining performance of British American Tobacco (Zimbabwe) Limited in its financial statement for the year ended 31 December 1998.

Action

47. The case was evaluated as a horizontal merger falling within the terms of section 2 of the Zimbabwe Competition Act of 1996. The examination of the proposed merger was based on information supplied by the merging parties' stakeholders: major customers, input suppliers, other tobacco manufacturers and tobacco associations. A cigarette consumption survey was also conducted in both urban and rural areas, and this was an important information source on product substitutability, brand loyalty, consumption patterns and smoking habits. The Competition Commission of Zimbabwe noted that, although the merger would result in the creation of a monopoly situation, other public interest benefits took precedence. Section 32 (5) of the Competition Act includes as such benefits the creation of greater economies of scale resulting in more efficient use of resources, the generation of foreign currency through exports, and the stabilization of cigarette prices on the local market. The failing firm defence put forward by the merging parties was considered a strong point in this connection. The Competition Commission therefore approved the merger with two conditions relating to the disposal of equipment and no price increases after the merger. Constant surveillance of future price increases was also part of this latter condition, with price rises needing to be justified to the Commission. The merged parties accepted the conditions and also successfully disposed of the surplus equipment to a third party which was interested in entering the cigarette market and which was due to commence production shortly.

Commentary

48. This case provides a reminder that, when applying merger control provisions, some developing countries take into account considerations of a public interest nature which may lead to the approval of mergers that might otherwise be considered anti-competitive. However, in this case, it appears that, even if only ordinary economic analysis had been applied, this would still have led to the approval of the merger, as it appears to have led to efficiency gains, and the failing firm defence may also have been applicable. The careful investigation of the market by the Zimbabwean Competition Commission is noteworthy, as are the conditions imposed for approving the merger, which enabled new market entry and continuing price monitoring by the Commission to ensure that the dominant position of the merged firm was not abused. This case would be of particular relevance to those developing countries which are facing a situation of "disinvestment" by transnational corporations.

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1 UNCTAD document TD/RBP/CONF.5/15 of 4 October 2000.

2 Such information was received from the Governments of Kenya, South Africa, Venezuela, Zambia and Zimbabwe.